

AMERICAN JURISPRUDENCE 2d



TRESPASS

—

TRIAL §§ 1-489

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VOLUME 75

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TO
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1991



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FOREWORD

Modern trial practice has undergone many changes in the almost 20 years since the original Am Jur 2d volumes dealing with **Trial** first appeared. The new **Trial** article, which commences in volume 75, continues in volume 75A and concludes in volume 75B, includes a completely new discussion of case development and preparation for trial, including such practical matters as the conduct of the client interview, case investigation, the use of computers in case preparation and trial briefs. Greatly expanded coverage is devoted to such bread-and-butter matters as dockets and calendars and in limine practice.

Expanded coverage deals with such current issues as courtroom security, the use of tape-recordings and television in courtroom proceedings (including the use of “day-in-the-life” videos) and the effect of misconduct by a trial judge. Trial-tested comment deals with such matters as the structure and order of opening and closing arguments. The constitutional and other ramifications of commenting on the failure to testify are thoroughly explored.

In dealing with counsel’s appeals to sympathy or prejudice, the recent holdings of the courts on such matters as references to the prevalence of crime and prejudice against homosexuals are thoroughly explored, as are comments on the relation of racial prejudice to sex crimes. Other divisions of the article deal with the province of court and jury; when a case may be taken from the jury; instructions by the court to the jury, the custody and conduct of the jury, and mistrial. In addition to a discussion of matters affecting verdicts, there is also a thorough treatment of post-trial motions and other post-trial matters, as well as consideration of rules governing trial by the court, as distinguished from trial by jury.

Also included in volume 75 is the expanded article **Trespass** which includes a discussion of such modern developments as the viability of the defenses of necessity, “choice of evils”, and “competing harms” to a charge of criminal trespass leveled against protesters on the grounds of abortion clinics and nuclear facilities. Also treated are remedies for continuing trespasses and privileges as a defense to trespass.

Each article has been enhanced by the inclusion of Observations, Practice Guides, Cautions, and Checklists providing detailed advice and procedures, as well as Research References directing the reader to related discussions in ALR and ALR Fed annotations, to practical advice in Am Jur Proof of Facts and Am Jur Trials, and to pertinent forms in Am Jur Pleading and Practice Forms (Rev) and Am Jur Legal Forms 2d.

A **Table of Statutes and Rules Cited** and **Table of Parallel References** for the articles in these volumes will be found immediately following this Foreword. An **Index** for each article will be found at the back of each volume containing the articles referred to above.

THE PUBLISHERS

TABLE OF PARALLEL REFERENCES

Use the following tables to find where the subject matter of the various sections of Am Jur 1st ed and 2d are treated in the Am Jur 2d Revised volumes.

When a particular subject matter is treated in another topic, the title of the other topic is noted. If a section of the earlier article has become obsolete, the table will show that it has been deleted.

Also consult the index at the end of the volume for detail and for matters not appearing in the earlier edition.

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TRESPASS

by

Robin C. Lerner, J.D.

Scope of topic: This article discusses the law of trespass in its broad aspects, including elements of, and particular conduct constituting, trespass. Also discussed are particular types of trespass, persons liable for trespass, defenses, remedies, damages, criminal liability, and matters of practice and procedure with regard to trespass and actions therefor.

Federal aspects:

Discussed in this article are federal statutes prohibiting trespassing upon military installations. Federal statutes forbidding trespass upon national forest, park, and other public lands, Indian lands, and nuclear power installations are also referred to in the article. (See "Federal Legislation," *infra*, for USCS citations.)

Treated elsewhere:

Acquisition of title to a chattel or real property by a trespasser, see 1 Am Jur 2d, Accession and Confusion §§ 9 et seq.

Trespass on the case, see 1 Am Jur 2d, Actions §§ 22 et seq.

Entry by excavator on adjoining land to shore up building, see 1 Am Jur 2d, Adjoining Landowners § 57

Removal of lateral or subjacent support, trespass by, see 1 Am Jur 2d, Adjoining Landowners §§ 67, 77; 54 Am Jur 2d, Mines and Minerals § 200

Stranger's trespass as affecting continuous adverse possession, see 3 Am Jur 2d, Adverse Possession § 103

Animals, trespass by, see 4 Am Jur 2d, Animals §§ 55-60

Nuclear power, or atomic energy, installations, trespass on, see 6 Am Jur 2d, Atomic Energy § 37

Use of force to eject trespasser, see 6 Am Jur 2d, Assault and Battery § 84

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- Trespases involving water and water rights, see 78 Am Jur 2d, Waters §§ 174, 239, 258, 282, 300, 359, 365

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Annotation References:

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Index to Annotations: Adjoining Landowners and Property; Adverse Possession; Consequential Damages; Criminal Law; Damages; Defenses; Easements; Estoppel and Waiver; Guests, Invitees, or Licensees; Injunctions; Intentional, Wilful, and Wanton Acts; Joint Tortfeasors; Loss of Enjoyment or Use; Multiple Damages;

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Practice References:

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17 Am Jur Legal Forms 2d, Trespass

6 Am Jur Proof of Facts 548, Proof No. 3, Invitee's Disregard of Sign; 6 Am Jur POF2d 595 §§ 1, 3, Contamination of Subterranean Water Supply by Sewage; 20 Am Jur POF2d 115, Damages: Value of Growing Crops; 21 Am Jur POF2d 567, Forcible Entry and Detainer: Requisite Right, Title, or Possession of Plaintiff; 21 Am Jur POF2d 607, Forcible Entry and Detainer: Requisite Force by Defendant; 28 Am Jur POF2d 703, Permissive Use of Land; 39 Am Jur POF2d 261, Acquisition of Title to Property by Adverse Possession; 42 Am Jur POF2d 247 § 5, Damages for Injury to Real Property; 48 Am Jur POF2d 153, Damages for Unauthorized Geophysical Exploration; 3 Am Jur POF3d 517 § 9, Leaking of Underground Storage Tanks

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18 USCS § 1382 (military installations)

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Auto-Cite®: Cases and annotations referred to herein can be further researched through the **Auto-Cite®** computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

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Research References

ALR Digest to 3d, 4th, and Federal: Trespass § 1

Index to Annotations: Trespass

Restatement, Torts 2d §§ 222A, 225

Speiser, Krause, and Gans, *The American Law of Torts* §§ 23:1, 23:2

1. IN GENERAL [§§ 1, 2]

§ 1. Trespass

Trespass is an injury to possession.¹ The word "trespass" in its broadest sense comprehends any misfeasance, transgression, or offense which damages another's person, health, reputation, or property,² comprising any transgression or offense against the laws of nature or society, whether it relates to person or property.³ It is an intrusion which invades a possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.⁴

Historically, a trespass was an invasion into tangible property which inter-

1. *Munsey v Hanly*, 102 Me 423, 67 A 217; *Jaycox v E.M. Harris Bldg. Co.* (Mo App) 754 SW2d 931; *Lane v Mims*, 221 SC 236, 70 SE2d 244; *Austin v Hallstrom*, 117 Vt 161, 86 A2d 549; *Belcher v Greer* (W Va) 382 SE2d 33, 105 OGR 167.

2. *Cox v Strickland*, 120 Ga 104, 47 SE 912.

As to particular types of trespass, see §§ 15 et seq.

3. *Grunson v State*, 89 Ind 533.

4. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

■■■■ *Definition:* The term "intrusion" is used to denote the fact that a possessor's interest in the exclusive possession of his land has been invaded by the presence of a person or thing upon it without the possessor's consent. Restatement, Torts 2d § 158, Comment c.

In the context of computers, a trespass is an invasion or intrusion upon the data base. *State v Olson*, 47 Wash App 514, 735 P2d 1362.

ferred with the right of exclusive possession.⁵ At common law, trespass was the remedy for all forcible, direct, and immediate injuries, whether occasioned to person or property.⁶ Thus, "trespass" is sometimes used to signify not merely those immediate wrongs remediable at common law, but also those indirect injuries resulting from a tortious act, the appropriate means of redress for which is an action of trespass on the case.⁷

§ 2. Continuing trespass

Where the act of a wrongdoer involves a course of action which is a direct invasion of the rights of another, such conduct is regarded as a trespass of a continuing character,⁸ for which a remedy by way of injunction will generally lie where the injury caused thereby is otherwise irreparable.⁹ Further, where a trespass is a continuing one, and not of that class of permanent appropriations to be assessed for all time at once, there may be successive actions for each continuance of the trespass.¹⁰

2. TRESPASS AND OTHER ACTIONS DISTINGUISHED [§§ 3-7]

§ 3. Generally

A trespass action is an action at law.¹¹ The essence of action for trespass is violation of possession, not challenge to title.¹²

Trespass bears certain resemblances to, and has been distinguished from, other actions, such as forcible entry and detainer,¹³ nuisance,¹⁴ and negligence.¹⁵

A de facto taking is similar to a trespass in that both require a physical entry; however, a trespass is temporary in nature, and de facto taking is a permanent ouster of the owner or a permanent interference with his physical use, possession, and enjoyment of the property by one having condemnation powers.¹⁶

■■■■ *Practice guide:* Inverse condemnation, rather than trespass, is the

5. *State v Olson*, 47 Wash App 514, 735 P2d 1362.

6. *Bishop v Hybud Equipment Corp.* (Summit Co) 42 Ohio App 3d 55, 536 NE2d 694.

The modern action for trespass to land stemmed inexorably from the common law action of trespass which lay when the injury was both direct and substantial. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

7. *Power v Hibbing*, 182 Minn 66, 233 NW 597; *Tichenor v Hayes*, 41 NJL 193.

As to trespass on the case, generally, see 1 Am Jur 2d, Actions §§ 22-27.

8. *Pappenheim v Metropolitan E., etc., R. Co.*, 128 NY 436, 28 NE 518 (maintenance of bed of elevated railroad in front of plaintiff's property); *Wheelock v Noonan*, 108 NY 179, 15 NE 67 (refusal to remove stone from the plaintiff's land by one whose license to keep it there had terminated).

As to continuing trespass with respect to real property, see § 26.

9. 42 Am Jur 2d, Injunctions § 149.

10. § 114.

11. *MacWillie v Southeast Alabama Gas Dist.* (Ala) 539 So 2d 245; *Butler v Lindsey* (App) 293 SC 466, 361 SE2d 621.

12. *AmSouth Bank, N.A. v Mobile* (Ala) 500 So 2d 1072; *Jaycox v E.M. Harris Bldg. Co.* (Mo App) 754 SW2d 931.

For discussion of actions for trespass to try title, see 25 Am Jur 2d, Ejectment § 4.

13. 35 Am Jur 2d, Forcible Entry and Detainer § 4.

14. § 6.

15. 57A Am Jur 2d, Negligence § 18.

16. *Carr v Fleming* (4th Dept) 122 App Div 2d 540, 504 NYS2d 904.

appropriate remedy for granting damages to an injured landowner where the trespasser is cloaked with the power of eminent domain.¹⁷

§ 4. Conversion and replevin

Conversion is, similar to trespass to chattel, the wrongful exercise of dominion over property in exclusion or defiance of a plaintiff's rights, where the plaintiff has a general or special title to the property or the immediate right to possession,¹⁸ for which the plaintiff may recover the fair, reasonable market value thereof.¹⁹

Comment: The important distinction between trespass to chattels and conversion lies in the measure of damages; in trespass, the plaintiff may recover for the diminished value of his chattel or his interest in its possession and use, while in conversion, the measure of damages is the full value of the chattel, at the time and place of the tort.²⁰

Observation: Under common law practice, not only could the person in possession of a chattel maintain an action of trespass or conversion, but the person entitled to its immediate possession could also maintain such an action; thus, both bailee and bailor at will could sue in either trespass or conversion.²¹

Replevin is based upon the wrongful taking or detention of property, and is in part a proceeding in rem, to regain possession of the goods and chattels and a proceeding in personam, to recover damages for the caption and detention.²²

§ 5. Contract

An action for breach of contract arises under an agreement between the parties,²³ while the gist of an action of trespass is the injury inflicted on the plaintiff.²⁴ However, where the owner of sheep pastures them on the land of another for a stated period of time, the pasturage being worth a given amount, the owner of the land may sue either for the trespass to the land or on an implied contract.²⁵ In case of an injury to land committed under a contract with the occupant whereby he was to receive compensation therefor, the remedy is on the contract, and not by an action for trespass to real property, since in such a case the injury consists in the violation of the promise to pay, and not in the acts committed on the land.²⁶

§ 6. Nuisance

Trespass and nuisance are separate torts for the protection of different interests invaded; trespass protects the possessor's interest in exclusive posses-

17. *Clempner v Southold* (2d Dept) 154 App Div 2d 421, 546 NYS2d 101.

For discussion of inverse condemnation, see 27 Am Jur 2d, Eminent Domain § 478.

18. *Ex parte SouthTrust Bank of Alabama, N.A.* (Ala) 523 So 2d 407, on remand (Ala App) 523 So 2d 413.

19. 18 Am Jur 2d, Conversion § 105.

20. Restatement, Torts 2d § 222A, Comment c.

For discussion of damages for an actions in trespass, see §§ 110 et seq.

21. Restatement, Torts 2d § 225, Comment a.

22. 66 Am Jur 2d, Replevin § 3.

23. 1 Am Jur 2d, Actions § 8.

24. § 1.

25. *Monroe v Cannon*, 24 Mont 316, 61 P 863.

26. *South Baltimore Co. v Muhlbach*, 69 Md 395, 16 A 117.

sion of property and nuisance protects the interest in use and enjoyment of the property²⁷ and does not require interference with the possession.²⁸ The same conduct on the part of a defendant may, and often does, result in the actionable invasion of both interests and the remedies are not necessarily mutually exclusive.²⁹

Definition: The term "trespass-nuisance" has been utilized to refer to conduct as to which a defense of governmental immunity does not apply, and has been defined as a trespass or an interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and results in personal or property damage.³⁰

The modern action for trespass to land stems inexorably from the common law action, which lay when the injury was both direct and substantial; nuisance, on the other hand, would lie when the injuries were indirect and less substantial.³¹ The law allows an action to be maintained in trespass for invasions that, at one time, were considered indirect and, thus, only a nuisance.³²

§ 7. Trespass on case

At common law, the remedy of trespass on the case, often simply referred to as case, is available where no specific remedy is given for an injury. The distinction between the common law actions of trespass and trespass on the case lies in the directness of the immediate character of the injury; an injury is considered immediate and therefore a trespass only when it is directly occasioned by the alleged act.³³ Further, an action of trespass presumes an active agency on the part of the wrongdoer in causing the injury and the doing of an act wantonly or in total disregard of the other's right, while an action of trespass on the case assumes that the injury is consequential, or, that the direct injury is the result of negligence or nonfeasance.³⁴

27. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120; *Fagerlie v Willmar* (Minn App) 435 NW2d 641.

Law Reviews: Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*. 14 J Legal Stud 13 (January, 1985).

28. *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120.

29. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

30. § 92.

31. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

32. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

33. *Holly v Boston Gas Light Co.*, 74 Mass 123.

Where the plaintiff's cow strays onto another's land through a defect in the fence which the owner was bound to repair and is there bitten by a dog, trespass, and not case, is the proper remedy. *Cate v Cate*, 50 NH 144.

When the defendant cuts trees on his own land and one accidentally falls on the land of the plaintiff, the latter may maintain an action of trespass for the injury. *Newsom v Anderson*, 24 NC 42.

Where fire set by a defendant to rubbish on one part of his land spread to another part of the land on which there was wood belonging to the plaintiff, and as a result, the wood was burned, trespass was the proper remedy, the injury being immediate from the progress of the flames and not arising after the flames had run their course. *Jordan v Wyatt*, 45 Va 151.

34. *Northern P.R. Co. v Lewis*, 162 US 366, 40 L Ed 1002, 16 S Ct 831; *Averill v Smith*, 84 US 82, 21 L Ed 613, 2 AFTR 2282; *Drake v Lady Ensley C., I. & R. Co.*, 102 Ala 501, 14 So 749; *Fleming v Lockwood*, 36 Mont 384, 92 P 962; *Sing v Headrick*, 34 Tenn App 187, 236 SW2d 95.

■■■■ Observation: Trespass on the case has been abolished in most jurisdictions;³⁵ a tort action comprehends all cases in which a remedy was formerly afforded either by an action of trespass or an action on the case.³⁶

B. TRADITIONAL ELEMENTS OF TRESPASS [§§ 8–14]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass § 2

Index to Annotations: Trespass

23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 1, 28

Restatement, Torts 2d §§ 7, 158, 163-166, 520

Speiser, Krause, and Gans, The American Law of Torts § 23:3

§ 8. Generally; affirmative act against possession

The tort of trespass is composed of components which include the character of the defendant's conduct in causing an intrusion upon the plaintiff's interest in the exclusive possession of the premises.³⁷

■■■■ Practice guide: To sustain a cause of action for trespass to real property, a plaintiff must allege a wrongful interference with his actual possessory rights in the property.³⁸

An action of trespass presumes an active agency on the part of the wrongdoer in causing the injury.³⁹ Liability for trespass may be imposed only if the trespass is intentional, reckless, negligent, or the result of ultrahazardous activity.⁴⁰ Trespass cannot be based on a mere nonfeasance or an omission to perform a duty; there must be an affirmative act, or a misfeasance.⁴¹ Thus, one is a trespasser if he stops on a highway and uses loud, obscene, or threatening language to the abutting land owner and is violent in manner.⁴² But, as a rule,

35. 1 Am Jur 2d, Actions § 22.

36. *Holly v Boston Gas Light Co.*, 74 Mass 123.

37. *Martin v Reynolds Metals Co.*, 221 Or 86, 342 P2d 790, cert den 362 US 918, 4 L Ed 2d 739, 80 S Ct 672 and (ovrld on other grounds by *Loe v Lenhardt*, 227 Or 242, 362 P2d 312 (ovrld on other grounds by *McLane v Northwest Natural Gas Co.*, 255 Or 324, 467 P2d 635, 35 OGR 368) as stated in *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255).

38. *Loftus v Mingo* (4th Dist) 158 Ill App 3d 733, 110 Ill Dec 368, 511 NE2d 203.

As to the petition or complaint in an action for trespass, generally, see § 205.

Forms: Complaint, petition, or declaration—Trespass to real property—General form. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 1.

39. *Northern P.R. Co. v Lewis*, 162 US 366,

40 L Ed 1002, 16 S Ct 831; *Averill v Smith*, 84 US 82, 21 L Ed 613, 2 AFTR 2282; *Sing v Headrick*, 34 Tenn App 187, 236 SW2d 95.

40. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505.

For discussion of the significance of intent, generally, see § 9.

As to trespass based on reckless, negligent, or dangerous activity, see § 12.

41. *Alabama Power Co. v Thompson*, 278 Ala 367, 178 So 2d 525; *Meredith v McClendon*, 130 Tex 527, 111 SW2d 1062; *Edwards v Hawkins* (Tex Civ App) 77 SW2d 1098.

Forms: Complaint, petition, or declaration—Trespass to real property—General form. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 1.

42. 39 Am Jur 2d, Highways, Streets, and Bridges § 187.

unless accompanied by some positive act, language alone, however offensive, does not constitute a trespass.⁴³

In cases of criminal trespass on school grounds, affirmative acts of disturbance are not required to constitute conduct which interferes with the peaceful conduct of the school activities; it is sufficient if the defendant's presence on school grounds interfered with the peaceful conduct of or disturbed school activities.⁴⁴

§ 9. Intent

A trespass must be an intentional invasion of the property of another.⁴⁵ There is no liability for a trespass unless it is intentional,⁴⁶ in the sense of an act voluntarily done,⁴⁷ except where the intrusion results from reckless or negligent conduct and abnormally dangerous activities.⁴⁸ For instance, in the case of trespass to real property, the mere fact that a landowner allowed what appeared to be a healthy tree to grow naturally and cross over onto the air space of the neighboring property, resulting in injury to the neighboring landowner when the limb fell, could not be viewed as an intentional act so as to constitute trespass.⁴⁹ Thus, the intent controlling on the question whether a trespass was committed is the intent to complete the physical act,⁵⁰ regardless if, in so acting, the actor did not intend to commit a trespass and, further, acted in good faith.⁵¹

Comment: Tort liability is never imposed upon one who has neither done an act nor failed to perform a duty and, thus, one whose presence on the land is not caused by any act of his own or his failure to perform a duty is not a trespasser.⁵²

Practice guide: While the age of a child will not protect him from

43. *Alabama Power Co. v Thompson*, 278 Ala 367, 178 So 2d 525; *Louisville & N.R. Co. v Barte*, 204 Ala 539, 86 So 394, 12 ALR 251; *Rand v Sargent*, 23 Me 326.

Forms: Complaint, petition, or declaration—Allegation—Unauthorized use of land—Incidental to use of adjoining highway. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 28.

44. *In re Jimi A.* (4th Dist) 209 Cal App 3d 482, 257 Cal Rptr 147, review den (Cal) 1989 Cal LEXIS 3853.

As to school trespass statutes, generally, and criminal liability thereunder, see §§ 194 et seq.

45. *Moulton v Groveton Papers Co.*, 112 NH 50, 289 A2d 68, 51 ALR3d 957.

As to the significance of intent to commit a trespass, in particular, to the person, to chattel, and to real property, see §§ 15, 16, 28.

46. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Gallin v Poulou* (1st Dist) 140 Cal App 2d 638, 295 P2d 958; *Publix Cab Co. v Colorado Nat. Bank*, 139 Colo 205, 338 P2d 702, 78 ALR2d 198; *Edgerton v H.P. Welch Co.*, 321 Mass 603, 74 NE2d 674, 174

ALR 462 (ovrld on other grounds by *Pridgen v Boston Housing Authority*, 364 Mass 696, 308 NE2d 467, 70 ALR3d 1106); *McDermott v Sway*, 78 ND 521, 50 NW2d 235; *Kite v Hamblen*, 192 Tenn 643, 241 SW2d 601; *General Tel. Co. v Bi-Co Pavers, Inc.* (Tex Civ App Dallas) 514 SW2d 168, 73 ALR3d 978 (strict liability theory was not applicable where plaintiff had notice and adequate opportunity to avoid harm).

47. *Shevlin-Carpenter Co. v Minnesota*, 218 US 57, 54 L Ed 930, 30 S Ct 663; *Publix Cab Co. v Colorado Nat. Bank*, 139 Colo 205, 338 P2d 702, 78 ALR2d 198; *McDermott v Sway*, 78 ND 521, 50 NW2d 235; *Kite v Hamblen*, 192 Tenn 643, 241 SW2d 601; *Feiges v Racine Dry Goods Co.*, 231 Wis 270, 285 NW 799, 122 ALR 272.

48. § 12.

49. § 29.

50. *Cleveland Park Club v Perry* (Mun Ct App Dist Col) 165 A2d 485.

51. *Cockrell v Pleasant Valley Baptist Church* (Mo App) 762 SW2d 879.

52. Restatement, Torts 2d § 158, Comment f.

liability if his act is denominated a trespass, since trespass is an intentional tort, an initial determination must be made whether the child formed the intent to do the physical act which released the harmful force, and it cannot be said as a matter of law that a child of any age is incapable of intending to do a physical act; whether he had such intent or whether his action was the result of negligence is a factual question where the child's age, experience, and knowledge may also be taken into consideration.⁵³

Where a statute criminalizes trespass, without the criminal intent a defendant commits no criminal trespass.⁵⁴

§ 10. —Intent to cause injury

An act may amount to a trespass despite the fact that its consequences were wholly unintended.⁵⁵ A trespass may be committed by consequential and indirect injury as well as by direct and forceable injury.⁵⁶ There is authority for the view that to be liable, a trespasser need not anticipate the damaging consequences of his acts, but need only intend the act that amounts to an unlawful intrusion upon an interference with the property rights of another.⁵⁷ Since the intent to complete the physical act is all that is required, the lack of intent to produce its serious consequences is irrelevant to the intentional tort of trespass.⁵⁸ However, it also has been stated that the word "intent," as used in conjunction with an action for trespass, denotes that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.⁵⁹

If an act causes injury as its immediate consequence, whether intentional or unintentional, the actor is liable in trespass for the damage caused.⁶⁰ It is not essential that the defendant act designedly if the injury is the immediate result of the force applied by him and the plaintiff is damaged thereby.⁶¹

§ 11. —Effect of mistake of law or fact

A party is liable in trespass even though acting under a mistaken belief of law⁶² or fact,⁶³ however reasonable,⁶⁴ unless the trespass was induced by the

53. *Cleveland Park Club v Perry* (Mun Ct App Dist Col) 165 A2d 485.

For a discussion of the liability of infants for torts, generally, see 42 Am Jur 2d, Infants §§ 140-144.

54. § 182.

55. *Post v Munn*, 4 NJL 61; *Newsom v Anderson*, 24 NC 42.

56. *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120.

57. *New York State NOW v Terry* (CA2 NY) 886 F2d 1339, 14 FR Serv 3d 922, later proceeding (SD NY) 1990 US Dist LEXIS 1905, withdrawn, reported at (SD NY) 732 F Supp 388, motion to vacate den (SD NY) 737 F Supp 1350 and cert den (US) 109 L Ed 2d 532, 110 S Ct 2206.

58. *Cleveland Park Club v Perry* (Mun Ct App Dist Col) 165 A2d 485.

59. *Branstetter v Beaumont Supper Club, Inc.*, 224 Mont 20, 727 P2d 933.

60. *Lightner Mining Co. v Lane*, 161 Cal 689, 120 P 771; *Welch v Durand*, 36 Conn 182 (ricochetting bullet); *McKee v Delaware & H. Canal Co.*, 125 NY 353, 26 NE 305.

For discussion of consequences of negligence, or nonfeasance, as significant to the common law distinction between trespass and trespass on the case, see § 7.

61. *Letterman v English Mica Co.*, 249 NC 769, 107 SE2d 753; *Newsom v Anderson*, 24 NC 42.

As to force as an element of trespass, see § 13.

62. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027; *Best v Allen*, 30 Ill 30; *Lusby v Kansas C., M. & B. R. Co.*, 73 Miss 360, 19 So 239; *Cockrell v Pleasant Valley Baptist*

conduct of the possessor.⁶⁵

A trespass is an intentional tort in the sense that it involves an intent to commit an act that violates a property right, or would be practically certain to have that effect, although the actor may not know that the act he intends to commit would amount to such a violation of another's rights.⁶⁶ Thus, a defendant is liable for an intentional entry although he has acted in good faith under the reasonable but mistaken belief that he is committing no wrong.⁶⁷ One who enters on land and commits acts of trespass is a wilful trespasser, even though he may honestly believe that under the known facts the law confers upon him good title.⁶⁸ However, it has been stated that an act which, as related to the true owner of land, might appear to be a trespass is not in fact a trespass if the act is committed in good faith by one who actually and sincerely believes that he is authorized to do the act in question.⁶⁹

■■■■ Comment: Since the intention required to make the actor liable for trespass is an intention to enter upon the particular piece of land in question, irrespective of whether the actor knows or should know that he is not entitled to enter, it is immaterial whether he honestly and reasonably believes that the land is his own, or that he has the consent of the possessor or of a third person having power to give consent on his behalf, or that he has a mistaken belief that he has some privilege to enter.⁷⁰ Ignorance does not excuse an entry upon the land of another.⁷¹

§ 12. —Reckless or negligent conduct and dangerous activities

Recklessness, negligence, or engaging in an extra-hazardous activity may

Church (Mo App) 762 SW2d 879; Gordon Creek Tree Farms, Inc. v Layne, 230 Or 212, 368 P2d 737 (not followed on other grounds by Fredeen v Stride, 269 Or 369, 525 P2d 166); Pittsburgh & West Virginia Gas Co. v Pentress Gas Co., 84 W Va 449, 100 SE 296, 7 ALR 901.

63. *Wooden-Ware Co. v United States*, 106 US 432, 27 L Ed 230, 1 S Ct 398; *Checkley v Illinois C.R. Co.*, 257 Ill 491, 100 NE 942; *Cockrell v Pleasant Valley Baptist Church* (Mo App) 762 SW2d 879; *Moore v Camden & T.R. Co.*, 74 NJL 498, 65 A 1021; *Gordon Creek Tree Farms, Inc. v Layne*, 230 Or 212, 368 P2d 737 (not followed on other grounds by *Fredeen v Stride*, 269 Or 369, 525 P2d 166); *Dexter v Cole*, 6 Wis 319.

As to consent based on a substantial mistake of fact invalidating it as a defense to trespass, see § 90.

64. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027; *Cockrell v Pleasant Valley Baptist Church* (Mo App) 762 SW2d 879.

65. Restatement, Torts 2d § 164.

66. *General Tel. Co. v Bi-Co Pavers, Inc.* (Tex Civ App Dallas) 514 SW2d 168, 73 ALR3d 978.

67. *Miller v National Broadcasting Co.* (2nd

Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

The trial court erroneously dismissed the plaintiff's complaint for failing to state a cause of action in trespass, where the petition sufficiently alleged that the respondent, its agents and employees, in the course of constructing an addition to a church, intended to and did invade the petitioner's property without permission and that such construction incurred within erroneous boundaries, since a party is liable in trespass even though acting under a mistaken belief of law or fact, however reasonable. *Cockrell v Pleasant Valley Baptist Church* (Mo App) 762 SW2d 879.

68. *Brown Jug, Inc. v International Brotherhood of Teamsters, etc.*, Local 959 (Alaska) 688 P2d 932, 117 BNA LRRM 2155, 102 CCH LC ¶ 11364; *Pittsburgh & West Virginia Gas Co. v Pentress Gas Co.*, 84 W Va 449, 100 SE 296, 7 ALR 901.

Restatement, Torts 2d § 164, Comment a.

69. § 103.

70. Restatement, Torts 2d § 163, Comment b.

71. *Little Pittsburg Con. Min. Co. v Little Chief Con. Min. Co.*, 11 Colo 223, 17 ¶ 760; *Boulton v Telfer*, 52 Idaho 185, 12 P2d 767, 83 ALR 1341, cert den 287 US 655, 77 L Ed 565, 53 S Ct 115; *J. F. Ball & Bro. Lumber Co. v Simms Lumber Co.*, 121 La 627, 46 So 674.

result in a trespass,⁷² regardless if the trespass was unintentional.⁷³ Except for the actors engaged in an abnormally dangerous activity, an unintentional and nonnegligent entry on the land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor, a thing, or a third person in whose security the possessor has a legally protected interest.⁷⁴ But, one who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter, is subject to liability to the possessor if the presence of the thing upon the land causes harm to the land or to the possessor.⁷⁵

Practice guide: In determining whether an activity is abnormally dangerous, the following factors are considered—

- The existence of a high degree of risk of some harm to the person, land, or chattels of others;
- The likelihood that the harm that results from it will be great;
- The inability to eliminate the risk by the exercise of reasonable care;
- The extent to which the activity is not a matter of common usage;
- The inappropriateness of the activity to the place where it is carried on;
- The extent to which its value to the community is outweighed by its dangerous attributes.⁷⁶

Observation: Trespass is an inappropriate theory of liability for a defendant's abnormally dangerous generation of hazardous waste⁷⁷ or the deliberate burning of an open field.⁷⁸

§ 13. Force

"Trespass" traditionally involves the idea of force,⁷⁹ since, at common law,

72. *Sterling v Velsicol Chemical Corp.* (WD Tenn) 647 F Supp 303, 17 ELR 20081, later proceeding (CA6 Tenn) 18 ELR 20978, 11 FR Serv 3d 213 and affd in part and revd in part (CA6 Tenn) 855 F2d 1188, 26 Fed Rules Evid Serv 1037, 11 FR Serv 3d 213, 19 ELR 20404; *Nissan Motor Corp. v Maryland Shipbuilding & Drydock Co.* (DC Md) 544 F Supp 1104, affd without op (CA4 Md) 742 F2d 1449, 1985 AMC 304; *Gallin v Poulou* (1st Dist) 140 Cal App 2d 638, 295 P2d 958; *Dial v O'Fallon*, 81 Ill 2d 548, 44 Ill Dec 248, 411 NE2d 217; *Hughes v King County*, 42 Wash App 776, 714 P2d 316, review den 106 Wash 2d 1006.

73. *Jersey City Redevelopment Authority v PPG Industries* (DC NJ) 655 F Supp 1257, 17 ELR 20763, later proceeding (DC NJ) 18 ELR 20364 and affd (CA3) 1988 US App LEXIS 18998; *Hudson v Peavey Oil Co.*, 279 Or 3, 566 P2d 175; *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255.

74. *Burke v Briggs*, 239 NJ Super 269, 571 A2d 296.

75. *Jersey City Redevelopment Authority v*

PPG Industries (DC NJ) 655 F Supp 1257, 17 ELR 20763, later proceeding (DC NJ) 18 ELR 20364 and affd (CA3) 1988 US App LEXIS 18998; *Hudson v Peavey Oil Co.*, 279 Or 3, 566 P2d 175; *Hoaglin v Decker*, 77 Or App 472, 713 P2d 674; *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255.

Restatement, Torts 2d § 165.

76. Restatement, Torts 2d § 520.

77. *Jersey City Redevelopment Authority v PPG Industries* (DC NJ) 655 F Supp 1257, 17 ELR 20763, later proceeding (DC NJ) 18 ELR 20364 and affd (CA3) 1988 US App LEXIS 18998 (absolute liability is the preferred theory of liability).

Annotations: Landowner's right to relief against pollution of his water supply by industrial or commercial waste, 39 ALR3d 910.

78. *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255.

79. *Cox v Strickland*, 120 Ga 104, 47 SE 912; *Frye v Baskin*, 241 Mo App 319, 231 SW2d 630.

trespass was the remedy for all forcible, direct, and immediate injuries, whether occasioned to person or property.⁸⁰

The action trespass lies whenever an injury to the plaintiff is, whether to his person⁸¹ or to his real⁸² or personal property,⁸³ the immediate result of force originally applied by the defendant.⁸⁴ However, the force exerted is not confined to actual violent force.⁸⁵ Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used.⁸⁶

Where an act is done which is a direct and immediate injury to the person or property of another, in legal contemplation, force is implied.⁸⁷ Thus, a failure to charge that the act alleged as constituting the trespass was committed with force may not be attacked by general demurrer where the declaration contains allegations showing a forcible act of the defendants resulting in a direct injury to the plaintiff.⁸⁸ Further, a trespass can result from indirect force.⁸⁹

§ 14. Injury and harm

The character and extent of the harm visited on the plaintiff in the interference with his interest in the exclusive possession of the premises are among the components of the tort of trespass.⁹⁰

Definition: Injury denotes, as used in tort law generally, the invasion of any legally protected interest of another.⁹¹

Distinction: Harm denotes, as used in tort law generally, the existence of a loss or detriment in fact of any kind to a person, resulting from any cause.⁹²

The most usual form of injury is the infliction of some harm; but there may be an injury although no harm is done. For instance, an unauthorized intrusion upon land in the possession of another is an injury, even though the intrusion is beneficial, or so transitory that it constitutes no interference.⁹³

80. § 1.

81. § 15.

82. §§ 25 et seq.

83. §§ 16 et seq.

84. *Alabama Power Co. v Thompson*, 278 Ala 367, 178 So 2d 525; *Frye v Baskin*, 241 Mo App 319, 231 SW2d 630; *Pearl v Pic Walsh Freight Co. (Hamilton Co)* 112 Ohio App 11, 15 Ohio Ops 2d 338, 168 NE2d 571.

85. *Checkley v Illinois C.R. Co.*, 257 Ill 491, 100 NE 942; *Dexter v Cole*, 6 Wis 319.

86. § 25.

87. *Jordan v Wyatt*, 45 Va 151.

88. *Waterman v Hall*, 17 Vt 128; *Elk Garden Big Vein Coal Mining Co. v Gerstell*, 95 W Va 471, 121 SE 569, 33 ALR 298.

For discussion of demurrers, generally, see 61A Am Jur 2d, Pleading §§ 238 et seq.

89. *AmSouth Bank, N.A. v Mobile (Ala)* 500 So 2d 1072 (recognizing rule).

As to indirect force as an element of trespass to real property, see § 33.

90. *Martin v Reynolds Metals Co.*, 221 Or 86, 342 P2d 790, cert den 362 US 918, 4 L Ed 2d 739, 80 S Ct 672 and (ovrld on other grounds by *Loe v Lenhardt*, 227 Or 242, 362 P2d 312 (ovrld on other grounds by *McLane v Northwest Natural Gas Co.*, 255 Or 324, 467 P2d 635, 35 OGR 368) as stated in *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255).

For discussion of continuing harm, resulting from a single trespass as distinct from a continuing trespass, see § 26.

91. Restatement, Torts 2d § 7(1).

92. Restatement, Torts 2d § 7(2).

93. Restatement, Torts 2d § 7, Comment a.

Harm to property includes the destruction, physical impairment, or wrongful taking of any thing that is the subject of ownership.⁶⁴

Unlike injury, harm, as understood in tort law, does not include a materially harmless invasion of the interest of a possessor in the exclusive possession of his land.⁶⁵ One is subject to liability to another for trespass to real property, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other or causes a thing or third person to do so.⁶⁶ In the case of trespass to the person, where the slightest degree of force suffices to constitute the trespass, the intended injury may be to the feelings or mind, as well as to the corporeal person.⁶⁷ In addition to a legal action for trespass to chattel, a possessor's interest in the mere inviolability of his personal property is protected by the privilege to use reasonable force to protect a possession against even harmless interference.⁶⁸

II. PARTICULAR TYPES OF TRESPASS [§§ 15–64]

A. TRESPASS TO PERSON [§ 15]

Research References

- ALR Digest to 3d, 4th, and Federal: Trespass § 2
- Index to Annotations: Trespass
- Restatement, Torts 2d §§ 13, 21
- Speiser, Krause, and Gans, The American Law of Torts § 23:4

§ 15. Generally

At common law, in all cases where an injury to the person is done forcibly and immediately by the act of the defendant, trespass may be maintained.⁶⁹ The slightest degree of force suffices to constitute trespass to the person, and the intended injury may be to the feelings or mind, as well as to the corporeal person.¹ No malus animus is necessary to maintain the action.²

||||| Comment: At common law, assault and battery were trespasses against the person; trespass for battery was the action for harm directly resulting to the person from an intentional act, and trespass for assault was the action to enforce liability for acts intended to cause a harmful or offensive contact with the person, or an immediate apprehension thereof.³

Trespass is the proper remedy wherever the act of the defendant is one of

94. § 126.

95. § 34.

96. § 17.

97. § 15.

98. § 17.

99. Ricker v Freeman, 50 NH 420.

As to the measure of damages for injuries to persons, generally, see § 126.

For discussion of compensatory damages for injuries to persons resulting from trespass, see § 143.

Law Reviews: Blay, Onus of proof of consent in an action for trespass to the person. 61 Austl. LJ 25-34 (Jan, 1987).

1. Clayton v Keeler, 18 Misc 488, 42 NYS 1051.

2. Ricker v Freeman, 50 NH 420.

3. Restatement, Torts 2d § 13, Comment a; § 21, Comment b.

For discussion of the intentional torts assault and battery, generally, see 6 Am Jur 2d, Assault and Battery §§ 109 et seq.

direct violence,⁴ such as the arrest of the plaintiff under a void warrant.⁵ The offense of false imprisonment is regarded as a trespass, and is classified as an injury to the person.⁶ It is a trespass to enter a woman's room and solicit her to have sexual intercourse,⁷ or to compel anyone to expose his or her body.⁸

B. TRESPASS TO CHATTEL [§§ 16-24]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass §§ 2, 9

Index to Annotations: Trespass

23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 61-64

Restatement, Torts 2d §§ 216-222

Speiser, Krause, and Gans, The American Law of Torts §§ 23:23, 23:24

1. IN GENERAL [§ 16]

§ 16. Generally; trespass to chattel defined

A trespass to chattel is the intentional use of or interference with a chattel, or personal property, which is in the possession of another, without justification.⁹ It is the intentional dispossession of another of the chattel, or the use or intermeddling with a chattel in the possession of another.¹⁰

Comment: While under early common law pleading, the form of action for trespass to chattel would lie for any direct and immediate interference with a chattel, whether the trespass was intentional, negligent, or accidental, the word "trespass," as applied to interference with chattels, has become limited to intentional interferences.¹¹

The unlawful taking away of another's personal property,¹² the seizure of property upon a wrongful execution,¹³ and the appropriation of another's

4. *Maher v Ashmead*, 30 Pa 344; *Hawksley v Peace*, 38 RI 544, 96 A 856; *Waterman v Hall*, 17 Vt 128.

5. *Maher v Ashmead*, 30 Pa 344.

Even if there was implied consent for defendant and two policemen to enter plaintiffs' property, defendant was liable for trespass because of his subsequent wrongful act of participating in a false arrest of one plaintiff. *Blackwood v Cates*, 297 NC 163, 254 SE2d 7.

For discussion of what constitutes false imprisonment and unlawful arrest, generally, see 32 Am Jur 2d, False Imprisonment §§ 13 et seq; 5 Am Jur 2d, Arrest §§ 112 et seq.

Annotations: False imprisonment: liability of private citizen, calling on police for assistance after disturbance or trespass, for false arrest by officer, 98 ALR3d 542.

6. 13 Am Jur 2d, False Imprisonment § 1.

7. *Newell v Whitcher*, 53 Vt 589.

8. *Lyon v Manhattan R. Co.*, 142 NY 298, 37 NE 113.

For discussion of criminal trespass, generally, see §§ 162 et seq.

As to the nature and the elements of crime of seduction, see 70 Am Jur 2d, Seduction §§ 3-12.

9. *Texas-New Mexico Pipeline Co. v Allstate Constr., Inc.*, 70 NM 15, 369 P2d 401, 16 OGR 759.

As to intent as an element of trespass, generally, see §§ 9 et seq.

For discussion of the distinction between trespass and conversion of personal property, see § 4.

10. § 17.

11. Restatement, Torts 2d § 217, Comment b.

12. *Stanley v Gaylord*, 55 Mass 536; *Wadleigh v Janvrin*, 41 NH 503; *White v Twitchell*, 25 Vt 620.

13. 30 Am Jur 2d, Executions § 750.

property to one's own use, even for a temporary purpose,¹⁴ are trespasses to chattel, although a mere removal of property without injuring it is not a trespass when done by one acting rightfully.¹⁵ Any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass.¹⁶

Trespass will not lie for goods delivered by the owner to the defendant and afterward sold, without authority by the latter, to a stranger.¹⁷

2. ELEMENTS OF AND FACTORS AFFECTING LIABILITY FOR TRESPASS TO CHATTEL [§§ 17-24]

§ 17. Generally; requisites of liability

A trespass to a chattel may be committed by the intentional dispossession of another's chattel, or by the use or intermeddling with a chattel in the possession of another.¹⁸

A person who commits a trespass to chattel is subject to liability therefor to the possessor of the chattel only if he dispossess the other of the chattel, the chattel is impaired as to its condition, quality, or value, the possessor is deprived of the use of the chattel for a substantial time or bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.¹⁹

Where damage intentionally inflicted on the personal property belonging to another does not result in complete destruction of the item, a claim for trespass to chattel will lie.²⁰

■■■■ Observation: In addition to a legal action, the possessor's interest in the mere inviolability of his chattel is protected by the privilege to use reasonable force to protect a possession against even harmless interference.²¹

§ 18. Requirement of plaintiff's possession of chattel; actual possession

Since an action for trespass to chattel is based on the injury done to the plaintiff's possession of personal property, in order to maintain the action the

14. *McCoy v Danley*, 20 Pa 85.

15. *Durell v Hayward*, 75 Mass 248; *Whitney v Swett*, 22 NH 10.

16. *Rand v Sargent*, 23 Me 326; *Woodruff v Halsey*, 25 Mass 333; *Pacific Tel. & Tel. Co. v Slezak*, 151 Wash 457, 276 P 904.

17. *Bradley v Davis*, 14 Me 44.

As to a trespass action for the unauthorized sale, pledge, or transfer of bailed property, generally, see 8 Am Jur 2d, *Bailments* § 302.

For discussion of a trespass action for possession of the goods by fraudulent purchase, see 67 Am Jur 2d, *Fraud and Deceit* § 332.

18. *Koepnick v Sears Roebuck & Co.* (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41.

Restatement, *Torts* 2d § 217.

Forms: Complaint, petition, or declaration—Allegation—Possession of personal property under claim of ownership. 23 Am Jur Pl & Pr Forms (Rev), *Trespass*, Form 63.

19. *Koepnick v Sears Roebuck & Co.* (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41.

Restatement, *Torts* 2d § 218.

20. *Seaphus v Lilly* (ND Ill) 691 F Supp 127.

21. *Koepnick v Sears Roebuck & Co.* (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41.

For discussion of liability in trespass for an excess of privilege respecting chattels, see § 64.

plaintiff must have been in either actual or constructive possession at the time of the injury.²²

|||| Definition: A person who is in "possession of a chattel" is one who has physical control of the chattel with the intent to exercise such control on his own behalf, or on behalf of another.²³

It is not necessary that the plaintiff be in exclusive possession of the place in which the personalty was kept in order to have possession of it sufficient to maintain trespass.²⁴

What constitutes the actual possession necessary to maintain an action of trespass must be understood in reference to the particular kind of property in question.²⁵

§ 19. —Constructive possession

Constructive possession designates, in relation to an action for trespass to chattel, the right of a general owner of a chattel in the possession of another to reclaim possession of the property at any time. In such circumstances, the person in possession of the chattel is not entitled to retain it against the will of the general owner, who is considered as having sufficient possession to enable him to maintain an action of trespass for injury to the chattel.²⁶

An interference by the owner of goods in the possession of one who has a special property in them, and the right of possession thereto, is an injury to such possession,²⁷ actionable as a trespass to chattel.²⁸ Where the owner of goods has been induced to part with them by fraud and deceit, he nevertheless has such constructive possession as will enable him to maintain trespass.²⁹ But, a mere trespasser who fails to retain possession of the chattel cannot be said to have acquired constructive possession for this purpose.³⁰ The immediate right of possession of a chattel mortgagee gives rise to an action for trespass against one who wrongfully takes or injures it.³¹ A purchaser of personal

22. Northern P.R. Co. v Lewis, 162 US 366, 40 L Ed 1002, 16 S Ct 831; Wilson v Haley Live Stock Co., 153 US 39, 38 L Ed 627, 14 S Ct 768; Fitzgerald v Elliott, 162 Pa 118, 29 A 346.

For discussion of constructive possession, see § 19.

Forms: Complaint, petition, or declaration—Allegation—Possession of personal property under claim of ownership. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 63.

23. Restatement, Torts 2d § 216.

24. Potter v Mather, 24 Conn 551.

As to availability of trespass as remedy by one co-owner of a chattel against other, see 20 Am Jur 2d, Cotenancy and Joint Ownership § 82.

25. Boston v Neat, 12 Mo 125.

26. Wilson v Haley Live Stock Co., 153 US 39, 38 L Ed 627, 14 S Ct 768; Deitsch v Wiggins, 82 US 539, 21 L Ed 228; Halliday v Hamilton, 78 US 560, 20 L Ed 214; Johnson v

Wilson & Co., 137 Ala 468, 34 So 392; Clark v Skinner (NY) 20 Johns 465; Trout v Kennedy, 47 Pa 387.

An executor or administrator has such title and right to possession of the decedent's goods as to be able to maintain trespass against one who takes them. Osborn v Bell (NY) 5 Denio 370.

Forms: Complaint, petition, or declaration—Allegation—Constructive possession—Chattel in hands of owner's agent or employee. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 64.

27. Lunsford v Deitrich, 86 Ala 250, 5 So 461.

28. Burdict v Murray, 3 Vt 302.

29. Butler v Collins, 12 Cal 457.

As to a trespass action for possession of the goods by fraudulent purchase, see 67 Am Jur 2d, Fraud and Deceit § 332.

30. Murphy v S. C. & P. R. Co., 55 Iowa 473, 8 NW 320.

31. Welch v Whittemore, 25 Me 86.

property may, prior to delivery, maintain a trespass action if at the time of the injury he was entitled to possession.³²

The owner of a chattel unquestionably may maintain an action in trespass for an injury thereto, notwithstanding a lack of actual possession.³³ Thus, where the owner of a chattel gratuitously loans it to another, but has the right to take it into his own possession whenever he pleases, it is settled that he has such a constructive possession as to enable him to maintain trespass for injury to the chattel.³⁴

§ 20. —Significance of possessor's lack of title

One in peaceable possession of a chattel, under claim of ownership, may maintain trespass against one who has seized or directly injured the property, even though the plaintiff himself has no title to it.³⁵ A possessor is considered provisionally as owner of the thing he possesses until the right of the true owner is established and one who possesses a thing for over a year acquires the right to possess it.³⁶ A servant may have possession of his master's chattel so far as any liability of the defendant is concerned.³⁷

As against a mere stranger or wrongdoer who can show no better right, possession without title is sufficient to maintain the action.³⁸ Even possession acquired tortiously is sufficient as against a stranger who can show no better right.³⁹

§ 21. Dispossession; use of force

One may be liable for personal injuries, resulting to one in the peaceable possession of property, from the employment of force and violence in disturbing such possession, even without reference to the question of legal title or right of possession,⁴⁰ where there is some infringement of the actual or constructive possession of the plaintiff.⁴¹ Although force is a common law element of trespass in general,⁴² forcible dispossession is not necessary to

32. *Crenshaw v Moore*, 10 Ga 384.

33. *Clark v Skinner* (NY) 20 Johns 465.

34. *Overby v McGee*, 15 Ark 459; *Root v Chandler* (NY) 10 Wend 110; *Orser v Storms* (NY) 9 Cow 687.

The owner of a chattel bailed or leased to another for a definite period cannot maintain trespass for an injury to the property during the continuance of the term for which he has parted with the possession of it. *New Jersey E.R. Co. v New York, L.E. & W.R. Co.*, 61 NJL 287, 41 A 1116; *Putnam v Wyley* (NY) 8 Johns 432; *Allison v McCune*, 15 Ohio 726.

As to a trespass action for the unauthorized sale, pledge, or transfer of bailed property, see 8 Am Jur 2d, *Bailments* § 302.

35. *Denver & R.G. Railway v Harris*, 122 US 597, 30 L Ed 1146, 7 S Ct 1286; *Bliss v Winslow*, 80 Me 274, 13 A 899; *Aikin v Buck* (NY) 1 Wend 466; *M'Gee v Campbell* (Pa) 7 Watts 545.

36. *Ballard v Mook* (La App 4th Cir) 550 So 2d 1208, cert den (La) 556 So 2d 1283.

37. *Restatement, Torts* 2d § 216, Comment b.

38. *Lunsford v Deitrich*, 86 Ala 250, 5 So 461; *Wincher v Shrewsbury*, 3 Ill 283; *Barron v Cobleigh*, 11 NH 557.

39. *Bliss v Winslow*, 80 Me 274, 13 A 899.

40. *Denver & R.G. Railway v Harris*, 122 US 597, 30 L Ed 1146, 7 S Ct 1286.

Forms: Complaint, petition, or declaration—Trespass to chattels—Allegation—Wrongful taking. 23 Am Jur Pl & Pr Forms (Rev), *Trespass*, Form 61.

Injury to chattels. 23 Am Jur Pl & Pr Forms (Rev), *Trespass*, Form 62.

41. *Illinois Bell Tel. Co. v Miner* (2d Dist) 11 Ill App 2d 44, 136 NE2d 1.

As to the necessity of constructive possession of the chattel, generally, see § 19.

42. § 13.

maintain the action for trespass to chattel; any interference or exercise of dominion with respect to another's property is sufficient.⁴³

■■■■ *Observation:* A dispossession is always a trespass to the chattel, and subjects the actor to liability, at least, for nominal damages for the interference with possession.⁴⁴

§ 22. Intent to use or intermeddle with chattel

Inasmuch as trespass to chattel is the intentional use of or interference with a chattel, which is in the possession of another, without justification,⁴⁵ the intention required to make an actor liable for trespass to a chattel is present when the act is done for the purpose of using or otherwise intermeddling with a chattel or with knowledge that such intermeddling will, with substantial certainty, result from the act.⁴⁶ No wrongful intent is necessary, only an intention physically to interfere with the goods themselves,⁴⁷ as by intentionally taking a chattel from the possession of another without the other's consent, or by barring the possessor's access to the chattel.⁴⁸ It is sufficient if the act is done without a justifiable cause or purpose, even though by accident or mistake.⁴⁹

■■■■ *Comment:* It is not necessary that the actor should know or have reason to know that such intermeddling is a violation of the possessory rights of another, and thus it is immaterial that the actor intermeddles with the chattel under a mistake of law or fact which has led him to believe that he is the possessor of it or that the possessor has consented to his dealing with it.⁵⁰

§ 23. Intent to dispossess

A dispossession of chattel may occur when someone intentionally assumes physical control over the chattel and deals with it in a way which will be destructive of the possessory interest of another person.⁵¹ A dispossession may be intentionally committed by taking a chattel from the possession of another without the other's consent, obtaining possession of a chattel from another by fraud or duress, barring the possessor's access to a chattel, destroying a chattel while it is in another's possession, or taking the chattel into the custody of the law.⁵²

■■■■ *Comment:* The intention necessary to subject to liability one who deprives another of the possession of his chattel is merely the intention to

43. Phillips v Hall (NY) 8 Wend 610.

As to what constitutes intentional dispossession of another's chattel, see § 23.

44. Restatement, Torts 2d § 222, Comment a.

As to nominal damages in actions for trespass, generally, see § 141.

45. § 16.

46. Texas-New Mexico Pipeline Co. v Allstate Constr., Inc., 70 NM 15, 369 P2d 401, 16 OGR 759.

Restatement, Torts 2d § 217, Comment c.

47. Mountain States Tel. & Tel. Co. v Horn Tower Constr. Co., 147 Colo 166, 363 P2d

175; Texas-New Mexico Pipeline Co. v Allstate Constr., Inc., 70 NM 15, 369 P2d 401, 16 OGR 759.

48. Koepnick v Sears Roebuck & Co. (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41.

49. Stanley v Gaylord, 55 Mass 536; Dexter v Cole, 6 Wis 319.

50. Restatement, Torts 2d § 217, Comment c.

51. Koepnick v Sears Roebuck & Co. (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41.

52. Restatement, Torts 2d § 221.

deal with the chattel in such a way that dispossession result; it is necessary, however, that the act is one the actor knows to be destructive of any possessory right.⁵³

An intermeddling with a chattel is not a dispossession unless the actor intends to exercise a dominion and control over it inconsistent with a possession in any person other than himself.⁵⁴

§ 24. —Duration of dispossession or deprivation of chattel

For a deprivation of use caused by a trespass to a chattel to be actionable, the time of the deprivation must be so substantial that it is possible to estimate a loss that is caused.⁵⁵ For instance, a two-minute search of a customer's vehicle in a store parking lot, by the police and a store employee, who suspected the customer of shoplifting, during which neither the truck nor its contents were damaged, did not constitute an actionable trespass inasmuch as the owner was not dispossessed of the vehicle for a substantial period of time.⁵⁶

C. TRESPASS TO REAL PROPERTY [§§ 25-60]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass §§ 2-7, 9

Index to Annotations: Trespass

23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 1, 2, 11, 12, 21, 22, 24, 28

Restatement, Torts 2d §§ 6, 157-161, 163, 166

Speiser, Krause, and Gans, *The American Law of Torts* §§ 23:5-23:18

1. IN GENERAL [§§ 25, 26]

§ 25. Generally; definition

The essence of a trespass to real property is the injury to the right of possession.⁵⁷

At common law, every man's land is deemed to be inclosed,⁵⁸ and every unauthorized, and therefore unlawful, entry into the close, or private property, of another is a trespass,⁵⁹ which necessarily carries with it some damage for which the trespasser is liable.⁶⁰

53. Restatement, Torts 2d § 222, Comment c.

54. *Koepnick v Sears Roebuck & Co.* (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41.

Restatement, Torts 2d § 221, Comment b.

55. *Koepnick v Sears Roebuck & Co.* (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41.

As to damages for the loss of use of chattel, generally, see § 139.

56. *Koepnick v Sears Roebuck & Co.* (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41.

57. *Munsey v Hanly*, 102 Me 423, 67 A 217;

Lane v Mims, 221 SC 236, 70 SE2d 244; *Austin v Hallstrom*, 117 Vt 161, 86 A2d 549.

58. *Heller v New York, N.H. & H.R. Co.* (CA2 NY) 265 F 192, 17 ALR 823; *Hanson v Carroll*, 133 Conn 505, 52 A2d 700; *Letterman v English Mica Co.*, 249 NC 769, 107 SE2d 753.

59. *Difronzo v Port Sanilac*, 166 Mich App 148, 419 NW2d 756, app den 431 Mich 852; *Morrison v Smith* (Tenn App) 757 SW2d 678.

60. *Heller v New York, N.H. & H.R. Co.* (CA2 NY) 265 F 192, 17 ALR 823; *Hanson v Carroll*, 133 Conn 505, 52 A2d 700; *Letterman v English Mica Co.*, 249 NC 769, 107 SE2d 753.

As to damages for trespass to real property, see § 130 et seq.

Forms: Complaint, petition, or declaration—

The essence of the modern cause of action for trespass is an unauthorized entry onto the land of another,⁶¹ but a trespass to real property may be an injury to, a use of,⁶² or an entry upon the real estate of another, without the consent,⁶³ invitation, or permission of the person lawfully entitled to possession of the real estate.⁶⁴

A trespass to real property is characterized as an intentional tort, regardless of the actor's motivation.⁶⁵

Trespass also has been defined as an invasion of the exclusive possession and physical condition of land,⁶⁶ or an interference with possession,⁶⁷ either by an unlawful act or by a lawful act performed in an unlawful manner.⁶⁸ A trespass on land means entries on land resulting directly or indirectly from the actor's act,⁶⁹ and also from the presence on the land of a thing which it is the actor's duty to remove.⁷⁰

|||| Observation: The common law writ of trespass *quare clausum fregit* sought redress for the intrusion, directly or indirectly, upon the real property of another.⁷¹ "Trespass on the land" generally is now used in the broader sense than the trespass which was addressed by the common law action, since it includes not only entries on land, but also the presence on the land of a thing which it is the actor's duty to remove.⁷²

§ 26. Continuing trespass to real property

An unprivileged remaining on land in another's possession is a continuing trespass for the entire time during which the actor wrongfully remains.⁷³

A trespass may be committed by the continued presence on the land of a

Trespass to real property—General form. 23
Am Jur Pl & Pr Forms (Rev), Trespass, Form 1.

61. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027; *Checkley v Illinois C.R. Co.*, 257 Ill 491, 100 NE 942.

62. *Merrill Stevens Dry Dock Co. v G & J Invest. Corp.* (Fla App D3) 506 So 2d 30, 12 FLW 1048, review den (Fla) 515 So 2d 229.

63. *Stone Resources, Inc. v Barnett* (Tex App Houston (1st Dist)) 661 SW2d 148.

64. *Magliocco v Olson* (Colo App) 762 P2d 681.

65. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

As to the intent to trespass on real property, see § 28.

66. *Knaus v Dennler* (5th Dist) 170 Ill App 3d 746, 121 Ill Dec 401, 525 NE2d 207, app den 122 Ill 2d 576, 125 Ill Dec 219, 530 NE2d 247.

67. *New York State NOW v Terry* (CA2 NY) 886 F2d 1339, 14 FR Serv 3d 922, later proceeding (SD NY) 1990 US Dist LEXIS 1905, withdrawn, reported at (SD NY) 732 F Supp 388, motion to vacate den (SD NY) 737 F Supp 1350 and cert den (US) 109 L Ed 2d 532, 110

S Ct 2206; *AmSouth Bank, N.A. v Mobile* (Ala) 500 So 2d 1072; *St. Louis County v Stone* (Mo App) 776 SW2d 885.

As to the requirement, in an action for trespass to real property, of possession, see §§ 36 et seq.

68. *New York State NOW v Terry* (CA2 NY) 886 F2d 1339, 14 FR Serv 3d 922, later proceeding (SD NY) 1990 US Dist LEXIS 1905, withdrawn, reported at (SD NY) 732 F Supp 388, motion to vacate den (SD NY) 737 F Supp 1350 and cert den (US) 109 L Ed 2d 532, 110 S Ct 2206.

69. § 33.

70. *Benjamin v American Tel. & Tel. Co.*, 196 Mass 454, 82 NE 681 (failure to remove telephone pole and wires); *Branstetter v Beaumont Supper Club, Inc.*, 224 Mont 20, 727 P2d 933; *Burke v Briggs*, 239 NJ Super 269, 571 A2d 296.

71. Restatement, Torts 2d, Chapter 7, Topic 1, Scope Note.

72. Restatement, Torts 2d, Chapter 7, Topic 1, Scope Note.

73. Restatement, Torts 2d § 158, Comment m.

structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land.⁷⁴

A continuing trespass must be distinguished from a trespass which permanently changes the physical condition of the land, in that a continuing harm, as by the removal of a structure or the removal of trees, does not subject the actor to liability for a continuing trespass; since the actor's conduct has produced a permanent injury to the land, the possessor's right is to full redress in a single action for trespass, and a subsequent transferee acquires no cause of action for the alteration of the condition of the land.⁷⁵ A continuing trespass is to be distinguished, not only from a single trespass of resulting in continuing harm, but also from a series of separate trespasses on land, in that a continuing trespass is actionable by the possessor even if the intrusion or entry was originally made on the land pursuant to consent or privilege, since a the rule of continuing trespass is applicable after the the transfer of ownership or possession, a matter of of importance where a trespass action for the original entry is barred by the statute of limitations.⁷⁶

An actor's failure to remove from land in possession of another a structure, chattel, or other thing which he has tortiously placed on the land constitutes a continuing trespass for the entire time during which the thing is on the land.⁷⁷ For instance, the act of the defendants in placing a fence on the plaintiffs' property is an act of trespass that continues for as long as the offending object remains.⁷⁸

2. ELEMENTS OF AND FACTORS AFFECTING LIABILITY FOR TRESPASS TO REAL PROPERTY [§§ 27-46]

a. IN GENERAL [§§ 27-31]

§ 27. Generally; requisites of liability

In general, one is subject to liability to another for trespass to real property, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other or causes a thing or third person to do so,⁷⁹ and remains on the land, or fails to remove from the land a thing he has a duty to remove.⁸⁰

74. § 52.

75. Restatement, Torts 2d § 162, Comment e.

76. Restatement, Torts 2d § 160, Comments f, h.

77. *Regan v Cherry Corp.* (DC RI) 706 F Supp 145; *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176 (storm sewer).

For discussion of remedies for a continuing trespass, see §§ 113 et seq.

As to running of statutes of limitations for continuing trespasses, see § 201.

78. *Owens v Smith* (La App 2d Cir) 541 So 2d 950.

Annotations: Right to maintain gate or fence across right of way, 52 ALR3d 9.

79. *Born v Exxon Corp.* (Ala) 388 So 2d 933; *Miller v Carnation Co.*, 33 Colo App 62, 516 P2d 661.

For discussion of possession as an element of trespass to real property, see §§ 36 et seq.

80. *Branstetter v Beaumont Supper Club, Inc.*, 224 Mont 20, 727 P2d 933.

For discussion of failure to remove a thing placed on the land, generally, including things placed with license or privilege, and things tortiously placed, see §§ 52 et seq.

As to liability in trespass for an excess of privilege respecting entries on real property, see § 63.

Restatement, Torts 2d § 158.

§ 28. Intent to enter or invade land

A trespass to real property requires the intentional entry onto the land of another,⁸¹ and is characterized as an intentional tort, regardless of the actor's motivation.⁸²

Illustration: In a trespass action brought by a telephone company against a paving contractor, for severing a telephone cable buried under a public street, where the defendant's employee did not intend to operate the equipment at the depth where the plaintiff was maintaining its cable, no cause of action was established under the definition of trespass as an intentional tort.⁸³

§ 29. —What constitutes requisite intent

If the actor intends to be upon the particular piece of land, it is not necessary that he intend to invade the other's interest in the exclusive possession of the land, since the intention required to make the actor liable for trespass is an intention to enter upon the particular piece of land in question, irrespective of whether the actor knows or should know that he is not entitled to enter.⁸⁴ In order than an actor may intentionally enter a particular piece of land, it is not necessary that he act for the purpose of entering; it is enough that he knows that his conduct will result in such an entry, inevitably or to a substantial certainty.⁸⁵ Further, the doing of an act which will almost certainly result in the entry of foreign matter upon another's land, such as the operation of a cement plant which continuously deposits dust and other substances onto a neighboring property, suffices for an intentional trespass to land, regardless of the lack of an intent to harm.⁸⁶

The intent required as a basis for liability as a trespasser is simply an attempt to be at the place on the land where the trespass allegedly occurred; the defendant is liable for an intentional entry though he has acted in good faith, and under the mistaken belief, however reasonable, that he is committing no wrong.⁸⁷

Illustration: The mere fact that a landowner allowed what appeared to be a healthy tree to grow naturally and cross over onto the air space of

81. *Manchester v National Gypsum Co.* (DC RI) 637 F Supp 646; *Brown Jug, Inc. v International Brotherhood of Teamsters, etc.*, Local 959 (Alaska) 688 P2d 932, 117 BNA LRRM 2155, 102 CCH LC ¶11364; *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Hughes v King County*, 42 Wash App 776, 714 P2d 316, review den 106 Wash 2d 1006.

Where a television camera crew intended to cross the threshold of a home to film life-saving activities of paramedics called to the scene, without the consent of either resident, the crew's more refined motivation or intentions were immaterial in terms of establishing the commission of an intentional tort. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

82. § 9.

83. *General Tel. Co. v Bi-Co Pavers, Inc.* (Tex Civ App Dallas) 514 SW2d 168, 73 ALR3d 978 (strict liability theory was not applicable where plaintiff had notice and adequate opportunity to avoid harm).

Annotations: Liability of one excavating in highway for injury to public utility cables, conduits, or the like, 73 ALR3d 987.

84. Restatement, Torts 2d § 163, Comment b.

85. Restatement, Torts 2d § 163, Comment c.

86. § 56.

87. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

For discussion of entry resulting from an indirect force, generally, see § 33.

the neighboring property, resulting in injury to the neighboring landowner when the limb fell, could not be viewed as an intentional act so as to constitute trespass.⁸⁸

■■■■ Observation: In an action for damage to plaintiffs' lands caused by the failure of the defendant's dam, an attempt to recover on the ground that the flooding of their lands constituted a harmful trespass, based on a finding of "constructive intent," was merely an unacceptable device to impose absolute liability upon the defendants.⁸⁹

§ 30. —Unintended or casual entry

At common law, a casual trespass meant one that was unintended, accidental, or negligent as contrasted with one under design or a claim of right.⁹⁰ For example, a trespass committed under a negligently mistaken belief in the right to enter and cut timber would not be casual since the trespasser intended to cut.⁹¹ On the other hand, a property owner could not be held liable for an intentional trespass, when rightfully excavating on property owned pursuant to a warranty deed, for rupturing a sewer line belonging to the adjoining landowner where the deed showed no easement for the sewer line and, thus, the owners had no notice of the line and no intentional intrusion had been shown.⁹²

■■■■ Observation: The possession of the owner of an easement over land is not sufficient to support an action of trespass for an injury to or disturbance in the enjoyment of the easement.⁹³

A distinction is to be made between accidental and intentional entries onto property inasmuch as accidental entries are often actionable when produced negligently or as a consequence of abnormally dangerous activities, but are not actionable as trespasses.⁹⁴

■■■■ Practice guide: Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or a third person to enter the land, does not subject the actor to liability to the possessor.⁹⁵

88. *Ivancic v Olmstead*, 66 NY2d 349, 497 NYS2d 326, 488 NE2d 72, 54 ALR4th 523, motion den 67 NY2d 754, 500 NYS2d 103, 490 NE2d 1229 and cert den 476 US 1117, 90 L Ed 2d 658, 106 S Ct 1975.

Annotations: Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 ALR4th 530.

89. *Moulton v Groveton Papers Co.*, 112 NH 50, 289 A2d 68, 51 ALR3d 957.

Annotations: Applicability of rule of strict or absolute liability to overflow or escape of water caused by dam failure, 51 ALR3d 965.

90. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

For discussion of statutory damages for trespass except for casual or involuntary entries, see § 154.

91. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

92. *Branstetter v Beaumont Supper Club, Inc.*, 224 Mont 20, 727 P2d 933.

93. *State ex rel. Green v Gibson Circuit Court*, 246 Ind 446, 206 NE2d 135; *Utilities & Industries Corp. v Linko Corp.*, 28 Misc 2d 88, 209 NYS2d 907.

As to trespass with respect to easements and rights of way, generally, see 25 Am Jur 2d, Easements and Licenses; 39 Am Jur 2d, Highways, Streets, and Bridges.

94. *Jersey City Redevelopment Authority v PPG Industries* (DC NJ) 655 F Supp 1257, 17 ELR 20763, later proceeding (DC NJ) 18 ELR 20364 and affd (CA3) 1988 US App LEXIS 18998.

As to trespasses involving reckless or negligent conduct, generally, see § 12.

95. *Restatement, Torts* 2d § 166.

§ 31. Place of intrusion or invasion

In general, a trespass may be committed on, beneath, or above the surface of the earth and may be committed upon the vertical as well as the horizontal surface of another's premises.⁹⁶

Illustration: If unprivileged, it is a trespass to pile dirt against a division wall or fence which stands wholly upon another's land, or to paint a sign or trail a vine on the wall, or to attach an electric wire to another's house.⁹⁷

A trespass to real property may also occur by an invasion taking place below the surface of the land, as, for example, by excavations beneath the surface of another's land in the course of mining operations,⁹⁸ or slant drilling into another's land during oil-drilling operations.⁹⁹ Similarly, removal of lateral and subjacent support is considered as a disturbance of the possession of an adjoining owner rendering the excavator liable in trespass.¹

A trespass to real property is not confined to an invasion thereof upon the surface of the ground; land has an indefinite extent, upward as well as downward, and any intrusion into the airspace above the land of another amounts to a trespass.² A trespass may be committed above the surface of the earth by the flight of aircraft in the air space above the land of another,³ if it enters into the immediate reaches of the air space next to the land, and interferes substantially with the other's use and enjoyment of his land.⁴

Reminder: There may be a separation of possession or ownership of the surface of the earth and what is above or beneath it, or some portion of it, which may result from a transfer or an agreement, or may be the effect of a special custom or rule of law in a particular jurisdiction.⁵

b. FORCE OR SUBSTANTIALITY OF INTRUSION [§§ 32-35]

§ 32. Generally; extent of damage

Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used.⁶ Neither the form or the instrumentality by which the close is broken nor the extent of the damages is

96. Restatement, Torts 2d § 159, Comments c, d.

For discussion of particular acts of entry, invasion, or intrusion constituting trespass to real property, see §§ 47 et seq.

97. Restatement, Torts 2d § 159, Comment d.

98. 54 Am Jur 2d, Mines and Minerals §§ 220, 221, 254.

99. 38 Am Jur 2d, Gas and Oil § 292.

1. 1 Am Jur 2d, Adjoining Landowners §§ 67, 77; 54 Am Jur 2d, Mines and Minerals § 200.

2. *Munro v Williams*, 94 Conn 377, 109 A 129, 13 ALR 508; *Herrin v Sutherland*, 74 Mont 587, 241 ¶ 328, 42 ALR 937; *Re Mueller's Will*, 188 Wis 183, 205 NW 814, 42 ALR 951.

3. 8 Am Jur 2d, Aviation § 4.

4. Restatement, Torts 2d § 159(2).

5. Restatement, Torts 2d § 159, Comment c.

6. *Checkley v Illinois C.R. Co.*, 257 Ill 491, 100 NE 942 (any unauthorized entry upon the land of another is a trespass, even though no actual force is exerted); *Letterman v English Mica Co.*, 249 NC 769, 107 SE2d 753; *Lee v Stewart*, 218 NC 287, 10 SE2d 804; *Mosseller v Deaver*, 106 NC 494, 11 SE 529.

For a discussion of force as an element of trespass, see § 13.

Forms: Complaint, petition, or declaration—Single act of trespass on realty—General form. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 1.

material,⁷ but since it is the possessor's right to exclusive possession that is being protected by an action for trespass, it is generally held that the invasion of the close must be physical and accomplished by a tangible matter.^{8,9}

§ 33. Indirect force

A trespass can result from indirect force. A trespass on land means entries on land resulting directly or indirectly from the actor's act.¹⁰ Thus, an entry may be accomplished by setting in motion an agency which, when put in operation, extends its energy to the plaintiff's premises to its material injury.¹¹ A landowner who sets into motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property.¹²

For an indirect invasion to amount to an actionable trespass, there must be an interference with plaintiff's exclusive possessory interest; that is, through the defendant's intentional conduct and with reasonable foreseeability, some substance has entered upon the land itself, affecting its nature and character, and causing substantial actual damage to the res.¹³ Thus, four elements which a plaintiff must prove in order to recover for an indirect trespass are (1) an invasion affecting an interest in the exclusive possession of his property; (2) an intentional doing of the act which results in the invasion; (3) reasonable foreseeability of the act done could result in an invasion of plaintiff's possessory interest; and (4) substantial damages to the res.¹⁴

§ 34. Substantiality of intrusion

One may be subject to liability to another for trespass, if he intentionally enters land in the possession of the other, or causes a thing or a third person to do so, irrespective of whether he thereby causes harm to any legally protected interest of the other.¹⁵

In some cases of trespass, a solution can be based on the ground that the defendant's conduct is not substantial enough to be regarded as a trespassory

7. *Whittaker v Stangvick*, 100 Minn 386, 111 NW 295; *Letterman v English Mica Co.*, 249 NC 769, 107 SE2d 753.

8, 9. § 35.

10. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Burke v Briggs*, 239 NJ Super 269, 571 A2d 296.

11. *Western Union Tel. Co. v Bush*, 191 Ark 1085, 89 SW2d 723, 103 ALR 367 (where the plaintiff sought damages for the loss of crops allegedly lost when defendant dug a hole in a levee and inserted therein a pole for the suspension of its lines, thereby causing the levee to break under the pressure of floodwaters); *Watson v Mississippi River Power Co.*, 174 Iowa 23, 156 NW 188 (ovrld on other grounds by *National Steel Service Center, Inc. v Gibbons* (Iowa) 319 NW2d 269, 31 ALR4th 650).

A complaint which alleges that the loss of defendant's wheat crop was due to a fire caused when his tractor, which was not prop-

erly equipped with a spark arrester, threw a spark or piece of burning carbon onto plaintiff's property while the defendant was operating his tractor on his own property, alleges an action for negligent trespass upon real property. *Zimmer v Stephenson*, 66 Wash 2d 477, 403 P2d 343.

12. *Miller v Carnation Co.*, 33 Colo App 62, 516 P2d 661; *Sheppard Envelope Co. v Arcade Malleable Iron Co.*, 335 Mass 180, 138 NE2d 777.

An intended act of physical trespass causing substantial damage occurred where ditch-directed rainwater from defendant's house eroded a retaining wall on plaintiff's land, thus causing the wall to partially collapse. *Steiger v Nowakowski*, 67 Wis 2d 355, 227 NW2d 104.

13. *Born v Exxon Corp.* (Ala) 388 So 2d 933.

14. *AmSouth Bank, N.A. v Mobile* (Ala) 500 So 2d 1072.

15. § 17.

intrusion.¹⁶ For instance, the installation of a television cable three-fourths of an inch in diameter, buried 30 inches below the plaintiff's land's surface, is not an additional or substantial burden on the property such to constitute a trespass.¹⁷

§ 35. —Tangibility of intruding or invading substance

Because it is the right of the owner or possessor to exclusive possession that is protected by an action for trespass, it is generally held that the invasion of the property be physical and accomplished by a tangible matter.¹⁸ Thus, in order to be liable for trespass, one must intentionally cause some "substance" or "thing" to enter upon another's land.¹⁹

Generally, all intangible intrusions, such as noise, odor, or light alone, are dealt with as nuisance cases, not trespass.²⁰ However, recovery has been allowed in trespass actions, predicated upon noise, gas emissions, or vibration intrusions which resulted in the deposit of particulate matter upon the plaintiff's property or on actual physical damage thereto.²¹

In order to recover in trespass for an intangible invasion to property, a plaintiff must show (1) an invasion effecting an interest in the exclusive possession of his property; (2) an intentional doing of the act which results in the invasion; (3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and (4) substantial damages to the res.²²

c. POSSESSION [§§ 36-46]

(1) IN GENERAL [§§ 36, 37]

§ 36. Generally

Since the essence of an action of trespass to real property is the injury to the right of possession,²³ in order to maintain the action the plaintiff must have

16. *Shaffer v Video Display Corp.* (Shelby Co) 43 Ohio App 3d 49, 539 NE2d 170; *Martin v Reynolds Metals Co.*, 221 Or 86, 342 P2d 790, cert den 362 US 918, 4 L Ed 2d 739, 80 S Ct 672 and (ovrld on other grounds by *Loe v Lenhardt*, 227 Or 242, 362 P2d 312 (ovrld on other grounds by *McLane v Northwest Natural Gas Co.*, 255 Or 324, 467 P2d 635, 35 OGR 368) as stated in *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255).

17. § 60.

18. *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120; *Morrison v Smith* (Tenn App) 757 SW2d 678.

As to trespass as a protection of the right of possession of real property, see § 25.

19. *Born v Exxon Corp.* (Ala) 388 So 2d 933.

20. 58 Am Jur 2d, Nuisances § 7.

21. § 56.

22. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

In the case of malodorous gases resulting from the burning of refuse, the aggrieved party must show that the wrongdoer actually invaded the rights of the person wronged and that the actions complained of produced an injury. *Koch v Eastern Gas & Fuel Associates*, 142 W Va 386, 95 SE2d 822.

Annotations: Liability for damage to land or its occupants from dust, gases, odors, vibration, or the like, occasioned by defendant's continuous vehicular use of adjoining or nearby public highway, 25 ALR4th 1192.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

23. § 25.

been in the actual or constructive possession of the land on which the acts of trespass were committed.²⁴

Definition: A person who is in the possession of lands is one who is in occupancy with the intent to control the land; or, who has been, but no longer is, in control of the land with such intent, if after he has ceased his occupancy without abandoning the land, no other person has obtained possession with the intent to control it; or, who has the right as against all persons to immediate occupancy of the land, if no other person is in possession, with the intent to control the land.²⁵

§ 37. Effect of time of possession

In order to maintain an action of trespass the plaintiff must have had actual or constructive possession of the real property in question at the time when the alleged injury occurred.²⁶ A purchaser acquiring title after the commission of a trespass cannot recover therefor²⁷ unless the title is retrospective in character, dating back prior to the time of the injury.²⁸ An exception is where a trespass is continuous in character and has not ceased at the time when the property is conveyed to the plaintiff, who may maintain an action for the injury sustained by him, even though the trespass began or originated prior to the conveyance of the property to the plaintiff.²⁹ For instance, a developer was liable to the plaintiff landowners for trespass for the removal of spoil, which had been dredged by the developer from a canal and placed on the land 16 years earlier, although at that time, the property was deeded by the developer to the plaintiffs' predecessor in interest, where neither deed referred to nor reserved any interest in the spoil to the developer.³⁰ Thus, if a possessory

24. *Barnhart v Ripka* (Mo App) 297 SW2d 787; *Craig Wrecking Co. v S. G. Loewendick & Sons, Inc.* (Franklin Co) 38 Ohio App 3d 79, 526 NE2d 321, motion overr; *Northfield Park Associates v Northeast Ohio Harness* (Cuyahoga Co) 36 Ohio App 3d 14, 521 NE2d 466, motion overr; *Pearl v Pic Walsh Freight Co.* (Hamilton Co) 112 Ohio App 11, 15 Ohio Ops 2d 338, 168 NE2d 571; *Lane v Mims*, 221 SC 236, 70 SE2d 244; *Belcher v Greer* (W Va) 382 SE2d 33, 105 OGR 167.

The State had no action for trespass to land where it failed to allege title to or a possessory interest in marsh land in which the defendant deposited fill. *State ex rel. Rhodes v Simpson*, 325 NC 514, 385 SE2d 329.

For discussion of what constitutes actual and constructive possession and factors relevant thereto, see §§ 38 et seq.

25. *Restatement, Torts* 2d § 157.

26. *Lovell v Dulac Cypress Co.* (CA5 La) 117 F2d 1, cert den 314 US 672, 86 L Ed 537, 62 S Ct 132, reh den 314 US 713, 86 L Ed 568, 62 S Ct 299; *Bowman v Hibbard*, 314 Ky 688, 236 SW2d 938; *Barnhart v Ripka* (Mo App) 297 SW2d 787; *Craig Wrecking Co. v S. G. Loewendick & Sons, Inc.* (Franklin Co) 38 Ohio App 3d 79, 526 NE2d 321, motion overr; *Northfield*

Park Associates v Northeast Ohio Harness (Cuyahoga Co) 36 Ohio App 3d 14, 521 NE2d 466, motion overr; *Lane v Mims*, 221 SC 236, 70 SE2d 244; *Belcher v Greer* (W Va) 382 SE2d 33, 105 OGR 167.

27. *Masonite Corp. v Burnham*, 164 Miss 840, 146 So 292, 91 ALR 752; *Jaycox v E.M. Harris Bldg. Co.* (Mo App) 754 SW2d 931 (equitable title rested on executory contract conferring no possessory right).

28. *Gilbert v McDonald*, 94 Minn 289, 102 NW 712; *Elk Garden Big Vein Coal Mining Co. v Gerstell*, 95 W Va 471, 121 SE 569, 33 ALR 298.

29. *Peck v Smith*, 1 Conn 103; *Milton v Puffer*, 207 Mass 416, 93 NE 634; *Matthews v James Lumber Co.*, 187 NC 651, 122 SE 480.

A storm sewer owned by the city and allegedly unlawfully placed on the plaintiff's property is a continuing trespass, and the fact that the plaintiff did not own the property at the time it was first installed does not prohibit his present claim for trespass. *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176.

30. *Avatar Properties, Inc. v Boney* (Fla App D2) 494 So 2d 289, 11 FLW 2010.

For discussion of continuing trespasses to

interest in land has been transferred subsequent to the actor's placing of a thing on the land, which constitutes a continuing trespass, the transferee of the land may maintain an action for its continuance there.³¹

The conveyance of the property prior to the trespass will not defeat the recovery of a plaintiff who remains in possession at the time of the injury.³² Further, the fact that the plaintiff transfers the property after the trespass does not divest him of his right of recovery if the injury was inflicted during the time of his control of the property.³³

(2) ACTUAL POSSESSION [§§ 38-42]

§ 38. Generally; acts of actual possession

Actual possession of real estate is always sufficient to sustain an action of trespass to real property against one having no superior right.³⁴ However, the rule that actual possession is sufficient to support an action of trespass does not authorize the plaintiff to maintain the action as to a portion of a tract of land not actually occupied by him.³⁵

Actual possession may be shown by acts of ownership or dominion,³⁶ and need not necessarily be exclusive.³⁷ Joint possession of the property in question with other persons is sufficient,³⁸ although, on the theory that actual and exclusive possession is necessary to maintain an action of trespass, a religious society which is permitted by the owner of a building to hold services therein cannot maintain an action for trespass upon real property against another religious organization which assembled therein, thereby preventing the former from holding its services.³⁹

real property, as distinct from separate successive trespasses, see § 26.

Forms: Complaint, petition, or declaration—Allegation—Removal of soil. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 22.

31. *Regan v Cherry Corp.* (DC RI) 706 F Supp 145; *Avatar Properties, Inc. v Boney* (Fla App D2) 494 So 2d 289, 11 FLW 2010.

32. *Hayward v Sedgley*, 14 Me 439.

33. *Irvine v Oelwein*, 170 Iowa 653, 150 NW 674; *Bowman v Hibbard*, 314 Ky 688, 236 SW2d 938; *Lancaster v Connecticut Mut. Life Ins. Co.*, 92 Mo 460, 5 SW 23.

34. § 39.

35. *Riley v Jameson*, 3 NH 23.

For the effect on this rule of actual possession under color of title, see § 40.

36. *Pearl v Pic Walsh Freight Co.* (Hamilton Co) 112 Ohio App 11, 15 Ohio Ops 2d 338, 168 NE2d 571.

Where the plaintiff had purchased a lot adjoining a waterway, where she had a house, a boathouse, and dock, and where she used a houseboat at the dock until the destruction by a hurricane, and the testimony further showed

she peaceably possessed the waterfrontage for no less than 10 years at the time of the defendant's intrusion, at the very least, the plaintiff was a possessor who could object to a trespass while the defendant had no ownership, lease, or possessory rights to the waterfrontage on the lot. *Ballard v Mook* (La App 4th Cir) 550 So 2d 1208, cert den (La) 556 So 2d 1283.

In a trespass action for debris which defendant caused to be placed upon plaintiff's land, evidence that plaintiff entered upon certain lands 19 years earlier, under written agreement purporting to convey an entire farm, including the subject parcel, that he conducted a dairy operation thereon, drew water from the parcel, had a survey conducted which included disputed area within his boundaries, and that following survey, he cut brush around main surveyor's pin on parcel to keep it clear, established possession of land sufficient to make out prima facie case of trespass. *Firment v Bryden* (3d Dept) 54 App Div 2d 796, 387 NYS2d 737.

37. *McCormick v Huse*, 66 Ill 315.

38. *Holly v Brown*, 14 Conn 255; *Kinney v Service*, 91 Mich 629, 52 NW 53.

39. *Religious Congregational Soc. v Baker*, 15 Vt 119.

■■■■ Observation: Where one enters under a deed, or by erecting a fence, one attempts to exclude others, or where, by the particular use one makes of the land, he indicates with precision the extent to which he proposes to enjoy it to the exclusion of others, such acts furnish a presumption that the entry on the property is for the purpose of taking possession.⁴⁰ Possession and a marking of the boundaries by definite and distinct monuments is good against one who subsequently comes without any evidence of a right to enter, and will entitle the party who has taken actual possession to maintain an action of trespass.⁴¹ One who has contracted to erect a building on state property does not, however, have such possession of the premises during the progress of the work that he may maintain an action of trespass if the state agents enter on the property and dispossess him.⁴²

The pursuit of game, the occasional cutting of trees, or the gathering of herbage or wild fruits, and similar acts, furnish no presumption that the entry on real property has been made for the purpose of taking possession.⁴³

Continuous and open use of property, though, is sufficient actual possession to enable the possessor to maintain an action for trespass against one with no more superior right.⁴⁴

§ 39. Significance of title; absence or invalidity of title

Actual possession of real estate, without title or with a defective title, is always sufficient to sustain an action of trespass to real property against one having no superior right.⁴⁵

Generally, title on the part of the plaintiff is not necessary to maintain an action for trespass to real property where the evidence shows a bona fide possession under claim or color of right,⁴⁶ although it has been stated that in order to recover for a trespass, plaintiff must have title.⁴⁷ The remedy of an action for trespass is available even to one who is only a possessor of the property, even against the owner, where the possessor is considered provision-

40. McLean v Farden, 61 Ill 106; Moore v Hodgdon, 18 NH 144.

41. Woods v Banks, 14 NH 101.

42. Caldwell v Donaghey, 108 Ark 60, 156 SW 839.

43. McLean v Farden, 61 Ill 106; Moore v Hodgdon, 18 NH 144.

■■■■ Definition: By occupancy is meant such acts done upon the land as manifest a claim to exclusive control of the land, and indicate to the public that he who has done them has appropriated it. Restatement, Torts 2d § 157, Comment a.

As to what constitutes actual possession for purposes of adverse possession, see 3 Am Jur 2d, Adverse Possession §§ 16 et seq.

44. Bileu v Paisley, 18 Or 47, 21 P 934, holding that persons engaged in mining and using ditches therefor during the mining season have sufficient possession of such ditches

to enable them to maintain an action of trespass against one having no right thereto.

45. Campbell v Rankin, 99 US 261, 25 L Ed 435; Burt v Panjaud, 99 US 180, 25 L Ed 451; Rosenthal v Crystal Lake (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176; Ballard v Mook (La App 4th Cir) 550 So 2d 1208, cert den (La) 556 So 2d 1283; Harrington v Chavez, 27 NM 67, 196 P 320; Evertson v Sutton (NY) 5 Wend 281; Firment v Bryden (3d Dept) 54 App Div 2d 796, 387 NYS2d 737; Lane v Mims, 221 SC 236, 70 SE2d 244; Linard v Crossland, 10 Tex 462; Frizzell-Jones Lumber Co. v Granberry (Tex Civ App Texarkana) 451 SW2d 805; Bileu v Paisley, 18 Or 47, 21 P 934; Bass v Planned Management Services, Inc. (Utah) 761 P2d 566, 89 Utah Adv Rep 11.

46. Beaufort Land & Invest. Co. v New River Lumber Co., 86 SC 358, 68 SE 637; Kunkel v Utah Lumber Co., 29 Utah 13, 81 P 897.

47. Difronzo v Port Sanilac, 166 Mich App 148, 419 NW2d 756, app den 431 Mich 852.

ally as owner of the property he possesses until the right of the true owner is established.⁴⁸

Where the owner of the equitable title, although in actual possession, seeks to maintain an action for permanent injuries to the property, whether against the holder of the legal title or a third person, the equitable title must be invoked and relied upon, since the actual possession is not sufficient to sustain the action, even as against a mere wrongdoer.⁴⁹

■■■■ Observation: A landlord who has granted possession to a tenant for a definite term has no immediate right of possession and cannot maintain an action for trespass during the term of the lease.⁵⁰

§ 40. —Effect of color of title to part of property

In contrast to the rule in actions of trespass grounded only upon actual possession by the plaintiff,⁵¹ where one enters into possession of a part of a tract of land under color of title to the whole tract, his entry under such circumstances operates as a possession of the entire premises described in his deed of conveyance,⁵² and is sufficient to maintain trespass for entry on any part of it.⁵³ A possessor in actual possession of a portion of property, the whole of which he claims under color of title, may recover for every successive trespass on the land, although the trespasser has actually occupied some portion of the land for a great number of years.⁵⁴

§ 41. —Effect of claim of title by adverse possession

One in adverse possession of land under claim of title may maintain trespass against another having no superior right of possession,⁵⁵ particularly where the plaintiff has acquired title by reason of long-continued adverse possession.⁵⁶

The general rule of adverse possession, that one who enters upon a tract of

48. *Ballard v Mook* (La App 4th Cir) 550 So 2d 1208, cert den (La) 556 So 2d 1283; *Owens v Smith* (La App 2d Cir) 541 So 2d 950; *Northfield Park Associates v Northeast Ohio Harness* (Cuyahoga Co) 36 Ohio App 3d 14, 521 NE2d 466, motion overr.

49. *Foster Lumber Co. v Arkansas V. & W.R. Co.*, 20 Okla 583, 95 P 224, adhered to 20 Okla 595, 100 P 1110; *Clay v St. Albans*, 43 W Va 539, 27 SE 368.

For discussion of the equitable title as effecting constructive possession, see § 45.

50. *AmSouth Bank, N.A. v Mobile* (Ala) 500 So 2d 1072.

As to trespasses involving landlord and tenant, generally, see 49 Am Jur 2d, *Landlord and Tenant* §§ 47, 226-228.

Annotations: Liability for interference with lease, 96 ALR3d 862.

Remedy of tenant against stranger wrongfully interfering with his possession, 12 ALR2d 1192.

51. § 38.

52. *Hicks v Coleman*, 25 Cal 122; *M'Colman v Wilkes*, 34 SCL 465; *Crowell v Bebee*, 10 Vt 33.

53. *Parker v Wallis*, 60 Md 15.

54. *Executors of Stevens v Hollister*, 18 Vt 294.

As to actual possession without a claim of right, see § 42.

For discussion of continuing trespass as giving rise to successive actions, see § 114.

55. *Carson v Turk*, 146 Ky 733, 143 SW 393.

Forms: Complaint, petition, or declaration—Allegation—Adverse possession. 23 Am Jur Pl & Pr Forms (Rev), *Trespass*, Form 12.

56. *Hughes v Graves*, 39 Vt 359.

As to possession without right in the case of a disseisor in whom title by adverse possession has not ripened, see § 42.

As to what constitutes actual possession for purposes of adverse possession, see 3 Am Jur 2d, *Adverse Possession* §§ 16 et seq.

Annotations: Use of property by public as affecting acquisition of title by adverse possession, 56 ALR3d 1182.

land under color of title to the whole is presumed to enter in accordance therewith, and therefore his actual possession of a portion of the property will, by presumption of law, be constructively extended to the entire tract,⁵⁷ applies to actions brought to recover damages for trespass.⁵⁸

§ 42. Possession without right

A possessor without a claim of right in real property may maintain trespass against anyone who unlawfully disturbs his possession,⁵⁹ except against the lawful owner⁶⁰ or someone claiming under him.⁶¹ The defendant in such an action for trespass may not set up in defense the title of a third person with whom there is no privity or connection.⁶²

A trespasser's continued occupation of premises after his original entry does not affect the right of the disseised owner to maintain the action.⁶³

|||| Practice guide: Subjective reasons for a defendant to be on the property of another, not related to a claimed property right or permission, are irrelevant and immaterial to the issue of a claim of right in an action for trespass.⁶⁴

(3) CONSTRUCTIVE POSSESSION [§§ 43–46]

§ 43. Generally

The possession required to maintain an action in trespass does not mean the occupancy of the property in question; constructive possession is sufficient.⁶⁵

|||| Definition: By occupancy is meant such acts done upon the land as manifest a claim to exclusive control of the land, and indicate to the public that he who has done them has appropriated it.⁶⁶

§ 44. Significance of title

The constructive possession which the legal title draws to itself is sufficient to enable the owner to maintain an action for trespass where the property is not in the actual possession of anyone,⁶⁷ or where the person in actual

57. 3 Am Jur 2d, Adverse Possession § 39.

58. M'Colman v Wilkes, 34 SCL 465.

59. Harrington v Chavez, 27 NM 67, 196 P 320; Evertson v Sutton (NY) 5 Wend 281; Bileu v Paisley, 18 Or 47, 21 P 934.

60. Lambert v Rainbolt, 207 Okla 451, 250 P2d 459; Hughes v Graves, 39 Vt 359.

61. Hughes v Graves, 39 Vt 359.

62. § 93.

63. § 201.

64. State v Scholberg (Minn App) 395 NW2d 454.

65. Jaycox v E.M. Harris Bldg. Co. (Mo App) 754 SW2d 931.

Forms: Complaint, petition, or declaration—Allegation—Constructive possession of vacant land by owner of legal title. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 11.

66. Restatement, Torts 2d § 157, Comment a.

67. Jaycox v E.M. Harris Bldg. Co. (Mo App) 754 SW2d 931; Green v Pettingill, 47 NH 375 (mortgage holder on one of several detached lots of wild and unoccupied land in the same county, in the name of all, has constructive legal possession of all); Daniels v Coleman, 253 SC 218, 169 SE2d 593; Lane v Mims, 221 SC 236, 70 SE2d 244.

Forms: Complaint, petition, or declaration—Allegation—Constructive possession of vacant land by owner of legal title. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 11.

possession is the mere agent or representative of the owner of the legal title.⁶⁸ However, legal title does not draw after it possession of real property actually occupied by another, so as to enable the owner to maintain trespass against such a possessor.⁶⁹ And, where land lies so little above water that it is uninhabitable, and valuable only for the timber on it, only that possession of which the land is capable, must be combined with the title.⁷⁰

Because actual possession of a mineral estate is virtually impossible until the minerals are under extraction, plaintiffs suing for trespass to mineral rights need legal title and, thus, constructive possession, to prosecute the action.⁷¹ But, persons engaged in mining and using ditches therefor during the mining season have sufficient possession of such ditches to enable them to maintain an action of trespass against one having no right thereto.⁷²

§ 45. —Equitable title; generally

The only function of equitable title is to draw to itself the constructive possession of real property which, in the absence of actual possession by the plaintiff, is essential to the maintenance of the action for trespass.⁷³ When the premises are vacant, equitable title performs this function.⁷⁴ The equitable title not only operates to create a constructive possession in its holder when the premises are unoccupied but, in cases of purchase of the equity of redemption, has been held to do so when they are actually occupied by another.⁷⁵ One who has the equitable title and full right to call for the legal title may, as against a trespasser, maintain the same action as one who has the entire ownership of land, legal and equitable.⁷⁶

§ 46. —Possessory right of vendee

One claiming equitable title to real property under an executory contract conferring no right of possession to the lands in question may not maintain a trespass action against the owner of the legal title, or one acting under his authority, before payment of the purchase price.⁷⁷ Although it has been stated that real estate contracts are clearly transfers of an equitable interest in property and the vendee has the right to possession of the land, the right to control, and the right to sue for trespass,⁷⁸ in general, where the equitable title

68. *Daniels v Coleman*, 253 SC 218, 169 SE2d 593.

69. *Daniels v Coleman*, 253 SC 218, 169 SE2d 593.

For a definition of "occupancy" of real property, see § 43.

70. *Carson v Turk*, 146 Ky 733, 143 SW 393.

71. *Belcher v Greer* (W Va) 382 SE2d 33, 105 OGR 167.

As to actions for trespass to mineral rights, generally, see 54 Am Jur 2d, Mines and Minerals §§ 220, 221, 254.

72. § 38.

73. *Jaycox v E.M. Harris Bldg. Co.* (Mo App) 754 SW2d 931; *Miller v Zufall*, 113 Pa 317, 6 A 350.

74. *Miller v Zufall*, 113 Pa 317, 6 A 350.

75. *Abbott v Sturtevant*, 30 Me 40; *Fernald v Linscott*, 6 Me 234.

As to a redemptioner's right of possession, generally, see 55 Am Jur 2d, Mortgages § 872.

76. *Russell v Meyer*, 7 ND 335, 75 NW 262.

77. *Greve v Wood-Harmon Co.*, 173 Mass 45, 52 NE 1070; *Jaycox v E.M. Harris Bldg. Co.* (Mo App) 754 SW2d 931; *McGrew v Foster*, 113 Pa 642, 6 A 346.

For discussion of the passing of title and right to possession of real property, generally, see 30 Am Jur 2d, Exchange or Property § 12.

As to remedies of a vendee, or purchaser, generally, see 77 Am Jur 2d, Vendor and Purchaser §§ 492-555.

78. *Chelan County v Wilson*, 49 Wash App 628, 744 P2d 1106.

rests upon an executory contract of purchase which has not been completely performed by the vendee, the right to maintain the action against the owner of the legal title depends upon the vendee's right of possession under the contract.⁷⁹

A party in lawful possession under such a contract may maintain trespass for injuries thereto, even against the owner of the legal title.⁸⁰

3. PARTICULAR ACTS OR OMISSIONS CONSTITUTING TRESPASS TO REAL PROPERTY [§§ 47-60]

a. ENTRY BY PERSONS ONTO OR FAILURE TO LEAVE PROPERTY [§§ 47-51]

§ 47. Entry of structure

To enter a structure without license to do so is a trespass.⁸¹ This is true whether the structure in question is a dwelling⁸² or a building used for business purposes or as a workshop or factory.⁸³

In many jurisdictions, a trespass to a structure or a building is a statutory criminal offense.⁸⁴

§ 48. —Effect of invitation to public

The fact that a professional man, merchant, or other person opens an office to transact business with and for the public is a tacit invitation to all persons having business with him, and a permission for such persons to enter, unless forbidden.⁸⁵ When a business, or public facility, is open to the public, a person who enters the facility, at a reasonable time and in a reasonable manner, has the implied consent of the owner to be there, and so long the person engages in no acts inconsistent with the purposes of the business or facility, there is no trespass; similarly, where a person enters a common area of a building, there is no intrusion or trespass because the person is clothed with the implied consent of the owner or possessor of the property.⁸⁶ Such an invitation,

For discussion of equitable title, or, equitable conversion resulting from a contract of sale of land, generally, see 77 Am Jur 2d, Vendor and Purchaser § 317.

79. *Newman v Mountain Park Land Co.*, 85 Ark 208, 107 SW 391; *Moyer v Scott*, 30 Mich 345.

A prospective purchaser of real property under an executory contract of sale could not maintain an action in trespass against the builder's constructive possession, coupled with its legal title and the contract specification of no right of possession by the purchaser until the parties closed, and thus, had no remedy against the builder in trespass for its destruction of trees on the property. *Jaycox v E.M. Harris Bldg. Co.* (Mo App) 754 SW2d 931.

80. *Smith v Price*, 42 Ill 399.

81. *Schwartz v McQuaid*, 214 Ill 357, 73 NE 582; *Adams v Freeman* (NY) 12 Johns 408.

82. *Taylor v Action Household Rentals, Inc.* (La App 2d Cir) 351 So 2d 865; *Adams v Freeman* (NY) 12 Johns 408.

As to the right to enter and search a dwelling under a search warrant, see 68 Am Jur 2d, Searches and Seizures § 16.

Forms: Complaint, petition, or declaration—Entering and injuring house and goods. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 4.

83. *Woodman v Howell*, 45 Ill 367; *Breitenbach v Trowbridge*, 64 Mich 393, 31 NW 402.

84. § 188.

85. *Woodman v Howell*, 45 Ill 367; *Breitenbach v Trowbridge*, 64 Mich 393, 31 NW 402; *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034 (entryways to the building posted with signs reserving its exclusive use to owners, tenants, and members of the public transacting business with them).

As to the right of solicitors, generally, to enter private premises, see 60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 62.

86. § 87.

however, presupposes that the conduct of persons coming there will be in keeping with the purpose of transacting business.⁸⁷

§ 49. —Revocation of invitation

The owner, or one in lawful possession of property, has the right to determine whom to invite, the scope of the invitation, and the circumstances under which the invitation may be revoked.⁸⁸ A business invitee may so conduct himself as to justify the revocation of his invitation to remain; when he does so conduct himself, and remains after the owner's request to leave, he becomes a trespasser,⁸⁹ and the owner then has a right to use force, if necessary, to remove him.⁹⁰

A person has the right in his private business to control it and, in so doing, may select such persons as he chooses with whom to transact such business, prevent whom he pleases from entering the office and, when a person under an implied license has entered, he retains the right to request such person to depart, at which time, the latter thereafter has no legal right to remain.⁹¹ Further, the fact that a professional center's tenants, medical professionals, issue a specific invitation to certain members of the public does not mean all members of the public have a license to enter; if the invitation to enter is limited either expressly or impliedly from the circumstances, then the proprietor has the right to protection afforded by the trespass laws.⁹²

§ 50. Failure to relinquish possession

An unprivileged remaining on land in another's possession is a continuing trespass for the entire time during which the actor wrongfully remains.⁹³ This may occur where the deed under which a person holds possession is vacated.⁹⁴

The owner, or one in lawful possession of property, has the right to

87. *Corn v State* (Fla) 332 So 2d 4.

88. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

89. *St. Louis County v Stone* (Mo App) 776 SW2d 885; *Commonwealth v Johnston*, 438 Pa 485, 263 A2d 376, 41 ALR3d 576.

The license of a protester, to enter a public clinic in which abortions were performed, could be revoked by subsequent conduct making her presence a trespass. *State v O'Brien* (Mo App) 784 SW2d 187.

90. *Commonwealth v Johnston*, 438 Pa 485, 263 A2d 376, 41 ALR3d 576.

As to revocation of implied consent or license for breach of condition, see § 91.

91. *Corn v State* (Fla) 332 So 2d 4; *Breitenbach v Trowbridge*, 64 Mich 393, 31 NW 402.

Abortion protestors committed a criminal trespass in entering and remaining on the property of persons operating abortion clinics after having been forbidden to do so, by instigating and encouraging others to enter and remain on that property knowing that such persons had been forbidden to do so, and by entering that property for the purpose, at least,

of interfering with the rights of the owners to conduct their business and of the users to obtain medical and counseling services. *NOW v Operation Rescue* (DC Dist Col) 726 F Supp 300, later op (DC Dist Col) 1990 US Dist LEXIS 9939.

As to the significance of this rule with respect to protesters on private property asserting the defense of necessity and a constitutional right of free expression, see, respectively §§ 170 et seq.

92. *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

As to criminal liability for trespass, generally, see §§ 162 et seq.

93. § 26.

94. *Green v Jordan*, 83 Ala 220, 3 So 513.

For discussion of trespass respecting the reversionary interest of the property owner, see 49 Am Jur 2d, Landlord and Tenant § 92; 51 Am Jur 2d, Life Tenants and Remaindermen §§ 2, 22.

As to trespass involving landlord and tenant, see 49 Am Jur 2d, Landlord and Tenant §§ 47, 226-228.

determine whom to invite, the scope of the invitation, and the circumstances under which the invitation may be revoked.⁹⁵ A person commits a trespass to realty merely by remaining inactive and wrongfully failing to remove from premises after being notified to do so.⁹⁶ Further, one who remains in a home after being directed to leave is guilty of a wrongful entry and becomes a trespasser even though the original entry was peaceful and authorized, and a homeowner may use such force as is reasonably necessary to eject him.⁹⁷

§ 51. Other entries

Whoever intrudes upon the space above the surface of privately owned land, without the permission of the owner, whether it be for fishing or other recreational purposes, such as floating a raft upon a river, commits a trespass.⁹⁸

b. FAILURE TO REMOVE OR INJURY TO STRUCTURES, CHATTELS, AND OTHER THINGS [§§ 52-54]

§ 52. Failure to remove structure, chattel, or thing

A trespass on land means entries on land resulting directly or indirectly from the actor's act and also from the presence on the land of a thing which it is the actor's duty to remove.⁹⁹

A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor, or his predecessor in interest,¹ has placed there,² even where the initial presence of a structure on another's property was authorized, or where the thing was placed onto the land with the consent to the landowner, but removal is not forthcoming after consent is withdrawn³ or effectively terminated.⁴

A trespass also may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land pursuant to a privilege conferred on the actor

95. § 49.

96. *Smith v Detroit Loan & Bldg. Ass'n*, 115 Mich 340, 73 NW 395; *State v O'Brien* (Mo App) 784 SW2d 187; *Whitney v Swett*, 22 NH 10; *Emry v Roanoke Navigation & Water Power Co.*, 111 NC 94, 16 SE 18.

A servant occupying a house upon his master's premises in connection with his services becomes a trespasser by insisting on retaining possession of the house and entering on the land after a lawful discharge by the master. *Mackenzie v Minis*, 132 Ga 323, 63 SE 900.

For discussion of possession without right, generally, see § 42.

97. *Taylor v Action Household Rentals, Inc.* (La App 2d Cir) 351 So 2d 865.

For discussion of criminal trespass, generally, and factors significant to liability thereunder, see §§ 162 et seq.

98. *People v Emmert*, 198 Colo 137, 597 P2d 1025, 6 ALR4th 1016.

Annotations: Rights of fishing, boating, bathing, or the like in inland lakes, 57 ALR2d 569.

Law Reviews: E. McKendricke, *Trespass to air space and property development*, 138 New LJ 23-6 (Jan 15, 1988).

99. § 25.

1. Restatement, Torts 2d §§ 160, 161(2).

2. Restatement, Torts 2d § 160.

Forms: Complaint, petition, or declaration—Constructing building partly on plaintiff's lot. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 23.

—Unauthorized use of lot for storage purposes. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 25.

—Damage to land by placing thereon material without consent of landowner. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 24.

3. *Merrill Stevens Dry Dock Co. v G & J Invest. Corp.* (Fla App D3) 506 So 2d 30, 12 FLW 1048, review den (Fla) 515 So 2d 229.

4. *Anchorage Yacht Haven, Inc. v Robertson* (Fla App D4) 264 So 2d 57.

irrespective of the possessor's consent, if the actor fails to remove it after the privilege has been terminated, by the accomplishment of its purpose or otherwise.⁵

§ 53. —Effect of tortious entry

Where a structure, chattel, or other thing is tortiously placed on the property, by the actor or his predecessor in legal interest, its continued presence constitutes a trespass, regardless whether the actor has the ability to remove it.⁶ An actor's failure to remove a structure, chattel, or other thing which he has tortiously placed on the land constitutes a continuing trespass for the entire time during which the thing is on the land.⁷

One who knows of a claim to land which he proposes to use as his own, proceeds at his peril if he goes forward in the face of protest from the claimant and places a structure upon the land.⁸

|||| Comment: Although a property owner may be liable for a trespass committed by his predecessor in interest, the liability of one who has tortiously placed a thing on the property of another is more stringent than the liability of his transferee, or the liability of one who has placed the thing on another's property with a revocable license; in such cases, the actor violates only the duty to remove the thing, and if such removal is impossible, he is excused from liability for its nonperformance.⁹

§ 54. Injury to structure, fixture, or improvement

Any injury to structures or fixtures on land, when forming part of the realty, may give rise to an action of trespass on the land.¹⁰ The wrongful destruction of a dam and millrace is a trespass to real property.¹¹ If any of the fixtures or portions of a building are carried away, an action of trespass may be maintained.¹²

C. INVASION OF MATTER ONTO PROPERTY [§§ 55–60]

§ 55. Generally

In order to be liable for trespass, one must intentionally cause some tangible substance or thing to enter upon another's land.¹³ However, although the invasion of the property must be physical and accomplished by a tangible matter,¹⁴ a physical invasion of the property of another may be accomplished by the casting of substances or objects upon the plaintiff's property from

5. Restatement, Torts 2d § 160.

6. Restatement, Torts 2d § 161.

7. § 26.

8. *Brinkley v Brinkley* (5th Dist) 174 Ill App 3d 705, 124 Ill Dec 353, 529 NE2d 70.

9. Restatement, Torts 2d § 161, Comment c.

10. *Lipsky v Borgman*, 52 Wis 256, 9 NW 158.

As to the right of a tenant in common to maintain a trespass against a cotenant for the

appropriation or removal of a fixture, see 35 Am Jur 2d, Fixtures § 28.

Forms: Complaint, petition, or declaration—Allegation—Removal of fence. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 21.

11. *Conwell v Brookhart*, 43 Ky 580.

12. *Wadleigh v Janvrin*, 41 NH 503.

13. § 35.

14. § 34.

without its boundaries.¹⁵ It is not necessary that the foreign matter should be thrown directly and immediately upon another's land; it is enough that an act is done with knowledge that it will, to a substantial certainty, result in the entry of foreign matter.¹⁶

|||| Comment: The actor, without himself entering the land, may invade another's interest in the exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of land, or into the air space above it.¹⁷

|||| Caution: In the absence of the possessor's consent, it is an actionable trespass to throw rubbish on another's land, even if the possessor uses it as a dump heap, or to fire projectiles or to fly a kite into the air above it, even though no harm is done to the land or to the possessor's enjoyment of it.¹⁸

§ 56. Particulate and polluting matter

A trespass need not be inflicted directly on another's realty, but may be committed by discharging foreign polluting matter at a point beyond the boundary of such realty.¹⁹ The doing of an act which will almost certainly result in the entry of foreign matter upon another's land, such as the operation of a cement plant which continuously deposits dust and other substances onto a neighboring property, suffices for an intentional trespass to land, regardless of the lack of an intent to harm.²⁰

15. *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120; *Miller v Carnation Co.*, 33 Colo App 62, 516 P2d 661 (drawing flies); *Munro v Williams*, 94 Conn 377, 109 A 129, 13 ALR 508; *Hennessy v Boston*, 265 Mass 559, 164 NE 470, 62 ALR 780; *Whittaker v Stangvick*, 100 Minn 386, 111 NW 295; *Hay v Cohoes Co.*, 2 NY 159; *B & R Luncheonette, Inc. v Fairmont Theatre Corp.*, 278 App Div 133, 103 NYS2d 747, reh den 278 App Div 808, 104 NYS2d 799; *Martin v Reynolds Metals Co.*, 221 Or 86, 342 P2d 790, cert den 362 US 918, 4 L Ed 2d 739, 80 S Ct 672 and (ovrld on other grounds by *Loe v Lenhardt*, 227 Or 242, 362 P2d 312 (ovrld on other grounds by *McLane v Northwest Natural Gas Co.*, 255 Or 324, 467 P2d 635, 35 OGR 368) as stated in *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255); *Digirolamo v Philadelphia Gun Club*, 371 Pa 40, 89 A2d 357; *Morrison v Smith* (Tenn App) 757 SW2d 678.

Forms: Complaint, petition, or declaration—Allegation—Unauthorized use of land—For deposit of materials. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 24.

16. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

17. Restatement, Torts 2d § 158, Comment h.

18. Restatement, Torts 2d § 158, Comment i.

19. *Renken v Harvey Aluminum (Inc.)* (DC Or) 226 F Supp 169; *Fairview Farms, Inc. v*

Reynolds Metals Co. (DC Or) 176 F Supp 178; *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Roberts v Permanente Corp.* (1st Dist) 188 Cal App 2d 526, 10 Cal Rptr 519; *Sheppard Envelope Co. v Arcade Malleable Iron Co.*, 335 Mass 180, 138 NE2d 777; *Hall v De Weld Mica Corp.*, 244 NC 182, 93 SE2d 56; *Ingmundson v Midland C.R.R.*, 42 ND 455, 173 NW 752, 6 ALR 714; *Martin v Reynolds Metals Co.*, 221 Or 86, 342 P2d 790, cert den 362 US 918, 4 L Ed 2d 739, 80 S Ct 672 and (ovrld on other grounds by *Loe v Lenhardt*, 227 Or 242, 362 P2d 312 (ovrld on other grounds by *McLane v Northwest Natural Gas Co.*, 255 Or 324, 467 P2d 635, 35 OGR 368) as stated in *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255).

As to trespass as a result of an indirect force, generally, see § 33.

Annotations: Liability for damage to land or its occupants from dust, gases, odors, vibration, or the like, occasioned by defendant's continuous vehicular use of adjoining or nearby public highway, 25 ALR4th 1192.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste, 39 ALR3d 910.

20. *Roberts v Permanente Corp.* (1st Dist) 188 Cal App 2d 526, 10 Cal Rptr 519.

If smoke or a polluting substance emitted from a defendant's operation causes the polluting substance to be deposited on the plaintiff's property, thus interfering with his exclusive possessory interest by causing substantial damage to the res, the plaintiff must seek his remedy in trespass.²¹ For instance, an action for trespass may be maintained for the emission, from a cement plant, of dust which physically damages the property and deprives the owners of the use and enjoyment of it;²² or the emission of invisible fluoride compounds, from an aluminum reduction plant, which settle upon the plaintiffs' land, rendering it unfit,²³ as for raising livestock.²⁴ Thus, recovery is allowed in trespass actions, predicated upon gas emissions which result in the deposit of particulate matter upon the plaintiff's property or on actual physical damage thereto.²⁵ However, it has been held that the settling of dust and other substances onto a landowner's property from a cement plant is in no sense a trespass upon the premises, where it is not claimed that the company operating the plant by any act entered upon the close of the landowner or in any way interfered with the physical occupancy of the premises.²⁶

Acts of trespass include invasion of the possessor's property by—

—Lead particles dropped by workmen;²⁷

—Pellets falling on the land from an air gun²⁸ or shotgun;²⁹

—Balls from a public playground kicked or thrown onto private property, causing substantial damage.³⁰

Overhanging trees do not constitute a trespass.³¹

As to what constitutes an intentional entry onto property, generally, see §§ 28 et seq.

Annotations: Liability for injury caused by spraying or dusting of crops, 37 ALR3d 833.

21. *Born v Exxon Corp.* (Ala) 388 So 2d 933 (stating that an alternative remedy in nuisance may co-exist).

22. *Roberts v Permanente Corp.* (1st Dist) 188 Cal App 2d 526, 10 Cal Rptr 519.

23. *Renken v Harvey Aluminum (Inc.)* (DC Or) 226 F Supp 169.

24. *Fairview Farms, Inc. v Reynolds Metals Co.* (DC Or) 176 F Supp 178; *Martin v Reynolds Metals Co.*, 221 Or 86, 342 P2d 790, cert den 362 US 918, 4 L Ed 2d 739, 80 S Ct 672 and (ovrld on other grounds by *Loe v Lenhardt*, 227 Or 242, 362 P2d 312 (ovrld on other grounds by *McLane v Northwest Natural Gas Co.*, 255 Or 324, 467 P2d 635, 35 OGR 368) as stated in *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255).

Annotations: Liability of oil and gas lessee or operator for injuries to or death of livestock, 51 ALR3d 304.

25. *Born v Exxon Corp.* (Ala) 388 So 2d 933; *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120.

Annotations: Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

26. *Thackery v Union Portland Cement Co.*, 64 Utah 437, 231 P 813.

27. *Van Alstyne v Rochester Tel. Corp.*, 163 Misc 258, 296 NYS 726.

28. *Munro v Williams*, 94 Conn 377, 109 A 129, 13 ALR 508; *Digirolamo v Philadelphia Gun Club*, 371 Pa 40, 89 A2d 357.

29. *Whittaker v Stangvick*, 100 Minn 386, 111 NW 295.

Annotations: Hunter's civil liability for unintentionally shooting another person, 26 ALR3d 561.

30. *Hennessy v Boston*, 265 Mass 559, 164 NE 470, 62 ALR 780.

Annotations: Liability to one struck by golf ball, 53 ALR4th 282.

31. *Ivancic v Olmstead*, 66 NY2d 349, 497 NYS2d 326, 488 NE2d 72, 54 ALR4th 523, motion den 67 NY2d 754, 500 NYS2d 103, 490 NE2d 1229 and cert den 476 US 1117, 90 L Ed 2d 658, 106 S Ct 1975 (by implication); *Flatley v Hartmann* (2d Dept) 138 App Div 2d 345, 525 NYS2d 637.

Annotations: Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 ALR4th 530.

§ 57. Floods

Flooding of the plaintiff's land because of the improper construction of highway embankments constitutes trespass.³² Where the defendant's affirmative act results in the flooding of the plaintiff's land and the destruction of crops, the defendant has committed a trespass.³³ However, because a trespass to real property requires the intentional entry onto the land of another,³⁴ floods resulting from a severe storm do not constitute a trespass.³⁵

§ 58. Structures; projections

The projection of eaves,³⁶ roofs,³⁷ bay windows,³⁸ shutters,³⁹ or dividing walls⁴⁰ constitute a trespass upon the real property.

§ 59. Noise; vibrations

Generally, all intangible intrusions such as noise are dealt with as nuisance cases, not trespass.⁴¹ A plaintiff may not maintain a trespass action for discomfort and annoyance caused by the generation of noise that does not cause any physical damage to the property.⁴²

Actionable trespass may be committed indirectly through concussions or vibrations activated by defendant's conduct.⁴³ Although one may be subject to liability to another for trespass irrespective of whether he thereby causes harm

32. *Viestenz v Arthur Tp.*, 78 ND 1029, 54 NW2d 572.

As to trespasses involving water and water rights, generally, see 78 Am Jur 2d, Waters §§ 174, 239, 258, 282, 300, 359, 365.

Annotations: Liability for overflow of water confined or diverted for public power purposes, 91 ALR3d 1065.

33. *Western Union Tel. Co. v Bush*, 191 Ark 1085, 89 SW2d 723, 103 ALR 367 (defendant dug a hole in a levee and inserted therein a pole for the suspension of its lines, thereby causing the levee to break under the pressure of floodwaters).

As to an action for trespass in remedy for injury to crops, see 21A Am Jur 2d, Crops §§ 63 et seq.

34. § 28.

35. *Moulton v Groveton Papers Co.*, 112 NH 50, 289 A2d 68, 51 ALR3d 957 (§ 28); *Hughes v King County*, 42 Wash App 776, 714 P2d 316, review den 106 Wash 2d 1006.

36. *Skinner v Wilder*, 38 Vt 115; *Huber v Stark*, 124 Wis 359, 102 NW 12.

As to the projection of a building or other structure over a boundary as a continuing trespass or nuisance, generally, see 1 Am Jur 2d, *Adjoining Landowners* § 118.

37. *Murphy v Bolger*, 60 Vt 723, 15 A 365.

38. *Codman v Evans*, 87 Mass 308.

39. *Homewood Realty Corp. v Safe Deposit & Trust Co.*, 160 Md 457, 154 A 58, 78 ALR 8.

40. *Rasch v Noth*, 99 Wis 285, 74 NW 820; *McCourt v Eckstein*, 22 Wis 153.

41. § 35.

42. *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120.

43. *Smith v Lockheed Propulsion Co.* (4th Dist) 247 Cal App 2d 774, 56 Cal Rptr 128, 29 ALR3d 538.

The trial court erred in granting a defendant landlord's nonsuit motion in an action for trespass, caused by the codefendant's punch press operation resulting in the plaintiffs' cameras losing calibration, where the plaintiffs' lease specifically prohibited the landlord from renting the adjoining unit to a punch press operator, where there was adequate evidence offered by the plaintiffs from which the jury could find that the landlord's negligence resulted in defendant lessees operating a punch press emitting vibrations which constituted a trespass on the plaintiffs' leasehold. *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165.

Annotations: Liability for damage to land or its occupants from dust, gases, odors, vibration, or the like, occasioned by defendant's continuous vehicular use of adjoining or nearby public highway, 25 ALR4th 1192.

Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

to any legally protected interest of the other,⁴⁴ for an indirect, intangible invasion, such as noise, to amount to an actionable trespass, there must result substantial actual damage to the res.⁴⁵ Thus, although a mere concussion caused by blasting operations does not constitute a trespass,⁴⁶ recovery is allowed in trespass actions predicated upon noise which results in actual physical damage.⁴⁷ For instance, vibrations caused by heavy industrial equipment in a building may give rise to an action in trespass where nearby property is damaged thereby.⁴⁸ And, recovery is allowed in trespass actions, predicated upon noise and vibration intrusions which result in the deposit of particulate matter upon the plaintiff's property or on actual physical damage thereto.⁴⁹

§ 60. Other intrusions or invasions

Other intrusions or invasions upon the real property of another which constitute a trespass include shooting across the land of another,⁵⁰ thrusting an arm across a boundary line,⁵¹ and the extension of wires across land.⁵²

However, the installation of a television cable three-fourths of an inch in diameter, buried 30 inches below the plaintiff's land's surface, is not an additional or substantial burden on the property such as to constitute a trespass.⁵³

44. § 27.

45. § 33.

46. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

As to liability for damage from concussions or vibrations caused by blasting, generally, see 31A Am Jur 2d, Explosions and Explosives §§ 90, 91.

Annotations: Recovery of damages for emotional distress, fright, and the like, resulting from blasting operations, 75 ALR3d 770.

Absolute liability for blasting operations as extending to injury or damage not directly caused by debris or concussion from explosion, 56 ALR3d 1017.

Liability for property damage by concussion from blasting, 20 ALR2d 1372.

47. *Born v Exxon Corp.* (Ala) 388 So 2d 933; *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165 (by implication); *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120.

48. *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165; *McNeill v Redington*, 67 Cal App 2d 315, 154 P2d 428.

49. *Born v Exxon Corp.* (Ala) 388 So 2d 933; *Wilson v Interlake Steel Co.*, 32 Cal 3d 229, 185 Cal Rptr 280, 649 P2d 922, 13 ELR 20120.

50. *Whittaker v Stangvick*, 100 Minn 386, 111

NW 295; *Herrin v Sutherland*, 74 Mont 587, 241 P 328, 42 ALR 937; *Re Mueller's Will*, 188 Wis 183, 205 NW 814, 42 ALR 951.

The trial court rejected the defendant's contention that the finding of trespass was not established by the evidence, where it was a reasonable inference that bullets heard passing over the plaintiffs' property coming from the direction of a gun club while shooting was being conducted there emanated from that source. *Racine v Glendale Shooting Club, Inc.* (Mo App) 755 SW2d 369.

Annotations: Hunter's civil liability for unintentionally shooting another person, 26 ALR3d 561.

51. *Hannabalsen v Sessions*, 116 Iowa 457, 90 NW 93.

52. *Butler v Frontier Tel. Co.*, 186 NY 486, 79 NE 716.

53. *Shaffer v Video Display Corp.* (Shelby Co) 43 Ohio App 3d 49, 539 NE2d 170 (cable was buried along a highway right of way pursuant to a county permit).

As to particular acts or omissions constituting trespass, see §§ 47 et seq.

Forms: Complaint, petition, or declaration—Allegation—Unauthorized use of land—Incidental to use of adjoining highway. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 28.

D. TRESPASS AB INITIO [§§ 61-64]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass § 7

Index to Annotations: Trespass

Restatement, Torts 2d §§ 136, 158, 214, 278

Speiser, Krause, and Gans, *The American Law of Torts* § 23:25**§ 61. Generally; applicability**

Where an authority is conferred by law, under which conduct otherwise constituting a trespass may be justified, an abuse of such authority will destroy the privilege and render the act done in excess of authority a trespass ab initio.⁵⁴ The law will operate retrospectively to defeat all acts thus done under color of lawful authority when the authority is exceeded and will operate retrospectively to prevent the acquisition of any lawful right by the abuse of an authority given for a useful and beneficial purpose.⁵⁵

Observation: The doctrine of trespass ab initio is described as a peculiar and anomalous fiction of the early common law, by which one who entered properly upon land in the exercise of a privilege conferred by authority of law, and subsequently abused the privilege by a trespass to person, chattels, or land, became liable not only for the later misconduct, but also forfeited the original lawful entry, to become a trespasser “ab initio” or from the beginning.⁵⁶

Caution: The modern view of tort law rejects, as to entries which are originally privileged, the doctrine of trespass ab initio.⁵⁷ Thus, conduct which would otherwise constitute a trespass is not a trespass if it is privileged; such a privilege may be derived from the consent of the possessor, or given by law because of the purpose for which the actor acts or refrains from acting.⁵⁸

The doctrine of trespass ab initio is, where still in use, applied both to public officers⁵⁹ and to private citizens acting under authority of law.⁶⁰

54. *Ilsley v Nichols*, 29 Mass 270; *State v Coleman*, 119 Or 430, 249 P 1049; *McClannan v Chaplain*, 136 Va 1, 116 SE 495.

For discussion of the privilege of authority in defense to an action for trespass, see §§ 103 et seq.

As to the liability of a public officer for acts committed in the line of duty, see 63A Am Jur 2d, *Public Officers and Employees* § 372.

55. *Ilsley v Nichols*, 29 Mass 270; *State v Coleman*, 119 Or 430, 249 P 1049; *McClannan v Chaplain*, 136 Va 1, 116 SE 495.

56. Restatement, Torts 2d § 214, Comment c.

57. Restatement, Torts 2d §§ 136, Comment b (trespass to person); 214, Comment c (trespass to real property); 278, Comment c (trespass to chattel).

58. § 83.

59. *Barrett v White*, 3 NH 210; *Paul v Slason*, 22 Vt 231 (limitation on liability for an officer's use of property attached by him, unless the property is injured by him, or used for his own benefit, or for the benefit of some person other than the debtor); *McClannan v Chaplain*, 136 Va 1, 116 SE 495.

Where a tax collector sells property lawfully seized for taxes after the expiration of the time prescribed by statute therefor, his act constitutes a trespass ab initio. *Pierce v Benjamin*, 31 Mass 356.

For discussion of failure of sheriff to file return as rendering him liable as trespasser ab initio, see 70 Am Jur 2d, *Sheriffs, Police, and Constables* § 128.

As to abuse of process as rendering officer

§ 62. Requisites of liability

In order to constitute one a trespasser ab initio, three elements must appear: (1) the act charged as demonstrating the trespass must be wrongful;⁶¹ (2) the authority abused must be an authority given by law and not by an individual;⁶² and (3) there must be some positive act of misconduct, and not a mere omission or neglect of duty.⁶³ It has been stated that it is difficult to see any difference in principle between misfeasance and nonfeasance in a ministerial officer since in either case he has disobeyed the statute or process he has sworn to execute faithfully.⁶⁴ One becomes a trespasser ab initio where he abuses an authority to remove from his premises the goods of a trespasser.⁶⁵

§ 63. Liability for excess of privilege; trespass to real property

An actor who has in an unreasonable manner exercised any privilege to enter land is subject to liability for any harm to a legally protected interest of another caused by such unreasonable conduct.⁶⁶ This rule applies not only where the actor deliberately abuses his privilege by doing an act which he recognizes as unnecessary or deliberately does an act which a reasonable man would so recognize, but also where the actor does not use reasonable care to prevent the exercise of the privilege from involving an unreasonable harm to the legally protected interests of others.⁶⁷

Illustration: If a labor union representative, who enters upon a job site to engage in lawful union activity, in fact does not confine himself to such lawful union activity, he forfeits such protection and subjects himself to liability for criminal trespass.⁶⁸

Comment: Under the modern view, in any case where the lawful entry upon land is used as a cover for subsequent misconduct, and the entry is for the purpose of taking advantage of the privilege conferred by the authority of law in order to commit another tort, the actor remains liable

trespasser ab initio, see 1 Am Jur 2d, Abuse of Process §§ 16, 17.

60. *Wendell v Johnson*, 8 NH 220; *State v Buckner*, 61 NC 558; *American Mortg. Corp. v Wyman* (Tex Civ App) 41 SW2d 270.

61. *Harris v Gillingham*, 6 NH 9.

62. *Louisville & N.R. Co. v Bartee*, 204 Ala 539, 86 So 394, 12 ALR 251; *Sheftall v Zipperer*, 133 Ga 488, 66 SE 253.

Where the defendant entered in pursuance of express authority conferred by the plaintiff, and not under an authority conferred by law, and according to all the cases, when the plaintiff himself gives authority to enter upon his premises, or into his house, he cannot, because the defendant exceeds or abuses his authority, convert that which was originally done under the sanction of his own license into a trespass, but must seek his remedy for the acts done in excess of the authority by some other appropriate action. *Bennett v McIntire*, 121 Ind 231, 23 NE 78.

The misuse of a license given by the owner does not constitute the licensee a trespasser ab initio. *Bradley v Davis*, 14 Me 44.

63. *Louisville & N.R. Co. v Bartee*, 204 Ala 539, 86 So 394, 12 ALR 251; *Waterbury v Lockwood* (Conn) 4 Day 257; *Nutt v Wheeler*, 30 Vt 436.

64. *Boston & M.R. Co. v Small*, 85 Me 462, 27 A 349.

65. *Whitney v Swett*, 22 NH 10.

66. Restatement, Torts 2d § 214(1).

67. Restatement, Torts 2d § 214, Comment a.

68. *Re Catalano*, 29 Cal 3d 1, 171 Cal Rptr 667, 623 P2d 228, 106 BNA LRRM 2565, 94 CCH LC ¶ 55340.

For discussion of the privilege of authority, as a defense to an action for trespass, see §§ 103 et seq.

and the subsequent misconduct is always to be considered as evidence bearing on the original intent.⁶⁹

One who properly enters land in the exercise of any privilege to do so, and thereafter commits an act which is tortious, is subject to liability only for such tortious act, and does not become liable for his original lawful entry, or for his lawful acts on the land prior to the tortious conduct.⁷⁰

■■■■ *Illustration:* In an action by a pipeline company to enjoin landowners from interfering with work on the pipeline, wherein landowners filed a class action for damages to land asserting that the pipeline company used areas exceeding those reasonably necessary to lay pipeline in efficient manner, doctrine of trespass ab initio was rejected in favor of modern rule that one who enters on or takes property under authority or license of possessor does not become trespasser ab initio by abusing his authority; thus, where there was no damage to the area from excess use, no recovery would be allowed.⁷¹

§ 64. Trespass to chattel

One who exercises any privilege to commit an act which would otherwise be a trespass to chattel is subject to liability for any harm to the interest of another in such chattel, caused by any dealing with it in a manner which is in excess of the privilege or not reasonably necessary to accomplish the purpose for which it is given.⁷²

III. PERSONS LIABLE [§§ 65-73]

A. IN GENERAL [§§ 65-69]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass § 1.5

Index to Annotations: Joint Tortfeasors; Restatement of Torts; Trespass Restatement, Agency 2d §§ 343, 344

Speiser, Krause, and Gans, *The American Law of Torts* § 23:27

§ 65. Trespassers, generally

A trespasser is one who enters the premises of another for his own purposes without permission, invitation, or other right.⁷³ Whoever commits or causes another to commit an act of trespass is liable therefor.⁷⁴ Thus, the age of a child will not protect him from liability if his act is denominated a trespass.⁷⁵

A person is a trespasser to chattel and is subject to liability therefor to the

69. Restatement, Torts 2d § 214, Comment f.

70. Restatement, Torts 2d § 214(2).

71. *Simpson v Phillips Pipe Line Co.* (Tex Civ App Beaumont) 603 SW2d 307, writ ref n r e (Dec 17, 1980) and reh'g of writ of error overr (Jan 21, 1981).

For discussion of the privilege of authority, in defense to an action for trespass, see §§ 103 et seq.

As to liability of public officers and employees for acts in excess of authority, see 63A Am Jur 2d, *Public Officers and Employees* § 373.

72. Restatement, Torts 2d § 278(1).

73. *Sumner v Hebenstreit* (5th Dist) 167 Ill App 3d 881, 118 Ill Dec 888, 522 NE2d 343.

74. *Loy v The S.B. F. X. Aubury*, 28 Ill 412; *Ricker v Freeman*, 50 NH 420; *Gregg v King County*, 80 Wash 196, 141 P 340.

75. § 77.

possessor of the chattel, who dispossess the other of the chattel, impairs its condition, quality, or value, deprives its possessor of its use for a substantial time, or causes bodily harm to the possessor or harm to some person or thing in which the possessor has a legally protected interest.⁷⁶ Thus, in the case of a wrongful sale of personal property, either the seller⁷⁷ or the purchaser⁷⁸ thereof may be sued in trespass, even though the latter was ignorant of the fact that the seller was not the true owner.⁷⁹

One is subject to liability to another for trespass to real property who, irrespective of whether he thereby causes harm to any legally protected interest of the other, intentionally enters land in the possession of the other or causes a thing or third person to do so, and remains on the land, or fails to remove from the land a thing he has a duty to remove.⁸⁰ Moreover, one is liable for the trespasses of others which are the natural result of his own acts.⁸¹

In civil law, a person on leased premises at the express invitation of the tenant is not a trespasser.⁸²

§ 66. Cotrespassers

All persons who command, instigate, promote, encourage, advise, countenance, cooperate in, aid, or abet the commission of a trespass, or who approve of it after it is done, if done for their benefit, are cotrespassers with the person committing the trespass, and are liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves.⁸³ If one or more of several persons become trespassers while engaged in the accomplishment of a lawful object, even with a view to aid such purpose, the others, who neither direct nor countenance such tortious acts, are not liable.⁸⁴

■ ■ ■ ■ Comment: An agent who assists another agent or the principal to commit a trespass is normally liable as a joint tortfeasor for the entire damage, except where good faith creates a privilege to act.⁸⁵

■ ■ ■ ■ Observation: To establish that a defendant is a joint tortfeasor in a

76. § 17.

77. Gray v Stevens, 28 Vt 1.

78. Stanley v Gaylord, 55 Mass 536; Gray v Stevens, 28 Vt 1.

79. Stanley v Gaylord, 55 Mass 536; Gray v Stevens, 28 Vt 1.

80. § 27.

81. Guille v Swan (NY) 19 Johns 381.

82. Karow v Student Inns, Inc. (4th Dist) 43 Ill App 3d 878, 2 Ill Dec 515, 357 NE2d 682, 98 ALR3d 531.

As to trespass with respect to the landlord and tenant relationship, generally, see see 49 Am Jur 2d, Landlord and Tenant §§ 47, 226-228.

83. Chirac v Reinicker, 24 US 280, 6 L Ed 474; Kapson v Kubath (DC Mich) 165 F Supp 542; Staples v Hoefke (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165; Donovan v Consolidated Coal Co., 187 Ill 28, 58 NE 290; McMannus v Lee, 43 Mo 206; Allred v Bray, 41

Mo 484; Kopka v Bell Tel. Co., 371 Pa 444, 91 A2d 232.

Where the only factual allegation in the plaintiffs' complaint, alleging that a telephone company intended or knew with a high degree of certainty that by granting licenses to certain cable television companies, such companies would trespass on the plaintiffs' lands, was that the telephone company entered into licensing agreements which permitted, under certain circumstances, the use of the telephone company's poles and conduits, such conduct alone did not make the defendant telephone company an aider or abettor to any subsequent trespass committed by the licensee companies, contrary to the express terms of the agreement. Dietz v Illinois Bell Tel. Co. (1st Dist) 154 Ill App 3d 554, 107 Ill Dec 360, 507 NE2d 24, app den (Ill) 113 Ill Dec 296, 515 NE2d 105.

84. Swackhamer v Johnson, 39 Or 383, 65 P 91; Richardson v Emerson, 3 Wis 319.

85. Restatement, Agency 2d § 343, Comment d.

trespass, it must be shown that the defendant proceeded tortiously, with intent or negligence.⁸⁶ The mere presence of one at the commission of a trespass, as a spectator, innocent of unlawful intent, is not sufficient to constitute him a trespasser, where he does nothing either to countenance or to approve those who were actors, even though he made no active effort to prevent the commission of the trespass.⁸⁷

§ 67. —Concert of action

In order for persons to be liable as cotrespassers, concert of action among the defendants is necessary.⁸⁸ Persons liable as cotrespassers are jointly and severally liable as joint tortfeasors, and may be sued either jointly or severally at the plaintiff's election.⁸⁹ Further, a cotrespasser who has been compelled to pay the whole amount of damages has no right to call upon his cotrespassers for contribution,⁹⁰ except where they have engaged in a legitimate undertaking in the pursuance of which they have committed a trespass unintentionally.⁹¹

When two or more tortfeasors, acting independently of each other, inflict an injury on the plaintiff, one cannot be held liable for the trespasses of the other.⁹² The degree of efficiency which a defendant exhibits in giving aid and countenance to the perpetrators of a trespass is not a factor in ascertaining his liability; it is enough if he was found acting in concert with them.⁹³

§ 68. —Ratification of trespass

A person who approves of a trespass after it is done, if done for his benefit, is liable as a cotrespasser.⁹⁴ Thus, by ratification or adoption of a trespass committed for one's benefit, a person may, although absent when the trespass was committed, become a principal and liable accordingly, even though the act was not done in obedience to his command or at his request.⁹⁵

86. *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165.

As to the nature of the liability of joint tortfeasors, generally, see 74 Am Jur 2d, Torts §§ 61 et seq.

87. *McMannus v Lee*, 43 Mo 206.

88. *Blaisdell v Stephens*, 14 Nev 17; *Barron v Cobleigh*, 11 NH 557.

In view of a very specific provision in the plaintiffs' lease, prohibiting the landlord from renting the adjoining southerly unit to another lessee who operates a punch press could adversely affect the plaintiffs' calibration of their photographic equipment, there was a sufficient nexus between the defendant landlord's allegedly negligent conduct in allowing the codefendant lessee to operate a punch press in the adjoining southerly unit, and that codefendant's alleged trespass in so doing, to warrant letting the jury decide if the landlord was responsible for the trespass as a joint tortfeasor with the codefendant. *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165.

89. *Kapson v Kubath* (DC Mich) 165 F Supp 542; *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165; *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008.

90. *Cumpston v Lambert*, 18 Ohio 81.

As to release and satisfaction of a cotrespasser as a defense to a subsequent action against a joint tortfeasor, see § 69.

For discussion of contribution among joint tortfeasors, see 18 Am Jur 2d, Contribution §§ 40 et seq.

91. *Jacobs v Pollard*, 64 Mass 287.

92. *Blaisdell v Stephens*, 14 Nev 17; *Barron v Cobleigh*, 11 NH 557.

A joint liability for injuries to a building caused by water from a sewer is not imposed on persons who have discharged surface water from their respective premises into such sewer, where each in so doing acted independently and without intent to cause the injury that resulted, but each person's liability in such case is limited to that part of the damages that was caused by his own act. *Bonte v Postel*, 109 Ky 64, 58 SW 536.

93. *Allred v Bray*, 41 Mo 484.

94. § 66.

95. *Bolinsky v Fritz* (Fla App D2) 544 So 2d 259, 14 FLW 1253; *Moir v Hopkins*, 16 Ill 313; *Harper v Baker*, 19 Ky 421; *Caldwell v Sacra*, 16 Ky 118.

In order to ratify a trespass, a person must either authorize or instruct the third party to do something, direct the third party's conduct, or accept the proceeds of the trespass with full knowledge of illegality.⁹⁶ The mere appropriation of the fruits of the trespass without knowledge is not sufficient.⁹⁷

Where an agent commits a trespass, a principal, after being fully informed of the trespass, may adopt it as his own act and such ratification ordinarily binds the principal to the same extent as if he had originally authorized it.⁹⁸ To hold the principal responsible for damages in such cases, it must appear that he ratified the wrongful act of the agent with a full knowledge of its tortious character.⁹⁹

The ratification relates back to the date of the unauthorized act so as to constitute the principal a trespasser *ab initio*, or, "from the beginning" of the act.¹

§ 69. —Effect of release or satisfaction on cotrespassers' liability

At common law, the party injured by a trespass may maintain an action against one or more or all of the joint trespassers at his election, and a judgment against one joint trespasser, which is unsatisfied, is no bar to other actions for the same injury against cotrespassers.² In view of the fact that the liability of cotrespassers is joint and several,³ and, under the common law, the plaintiff can have only one satisfaction for the injury suffered,⁴ a satisfaction of the damages made by one of several cotrespassers to the party injured discharges the remaining cotrespassers from liability.⁵ Such a rule, however, may be modified by a statute providing that a plaintiff who settles with one tortfeasor may bring subsequent actions against joint tortfeasors, but providing a mechanism for mandatory set-off against the amount received in a subsequent verdict against one or more of the other tortfeasors.⁶

An outright release of one or more of the cotrespassers is a release of them

96. *W. E. Belcher Lumber Co. v York*, 245 Ala 286, 17 So 2d 281; *Bolinsky v Fritz* (Fla App D2) 544 So 2d 259, 14 FLW 1253 (by implication); *Dietz v Illinois Bell Tel. Co.* (1st Dist) 154 Ill App 3d 554, 107 Ill Dec 360, 507 NE2d 24, app den (Ill) 113 Ill Dec 296, 515 NE2d 105 (by implication).

97. *W. E. Belcher Lumber Co. v York*, 245 Ala 286, 17 So 2d 281; *Bolinsky v Fritz* (Fla App D2) 544 So 2d 259, 14 FLW 1253 (by implication).

98. *W. E. Belcher Lumber Co. v York*, 245 Ala 286, 17 So 2d 281.

As to the liability of a principal for the trespass of his agent, generally, see § 72.

99. *W. E. Belcher Lumber Co. v York*, 245 Ala 286, 17 So 2d 281.

A property owner, who, with her husband, was found liable for trespass resulting from the building of a seawall on their property which extended a couple feet onto the adjoining property, blocking a drainage ditch which resulted in flooding thereon, notwithstanding

that the landowner's husband had been notified not to build his seawall onto the others property for exactly that reason, was erroneously held liable where her husband had been primarily responsible for the seawall's construction and there is no evidence that he informed his wife of the neighbor's objection thereto. *Bolinsky v Fritz* (Fla App D2) 544 So 2d 259, 14 FLW 1253.

1. *W. E. Belcher Lumber Co. v York*, 245 Ala 286, 17 So 2d 281.

As to the doctrine of trespass *ab initio*, see § 61.

2. *Sheldon v Kibbe*, 3 Conn 214; *Fowler v Owen*, 68 NH 270, 39 A 329.

3. § 66.

4. 1 Am Jur 2d, Accord and Satisfaction § 9.

5. *Ayer v Ashmead*, 31 Conn 447; *Snow v Chandler*, 10 NH 92; *Hawkins v Hatton*, 10 SCL 318.

6. *Emery Waterhouse Co. v Lea* (Me) 467 A2d 986.

all.⁷ The modern tendency of the courts is to give effect to the intention of the parties to a release, and they hold that if an intention not to release other joint tortfeasors does appear, they are not released, unless the amount received as consideration for the release is full compensation for the injury.⁸ A partial payment made by a cotrespasser in satisfaction of the damages sustained from the joint trespass inures to the benefit of the others, and, in an action against them, must be considered by the jury in determining the amount of their verdict.⁹

B. LIABILITY AS BETWEEN PERSONS IN BUSINESS RELATIONSHIP; VICARIOUS LIABILITY [§§ 70-73]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass § 1.5

Index to Annotations: Respondeat Superior; Restatement of Torts; Trespass; Vicarious Liability

17 Am Jur Legal Forms 2d, Trespass, § 249:4

Restatement, Agency 2d §§ 343, 344

Speiser, Krause, and Gans, *The American Law of Torts* § 23:27

§ 70. Generally; employer and employee

A person may be liable for the trespass committed by another only if the alleged trespasser is employed, paid, or controlled by the party.¹⁰

A master's liability for a trespass committed by a servant is based upon the doctrine of respondeat superior.¹¹ The test of liability is whether the acts constituting the trespass were within the general scope of the servant's employment while engaged in the employer's business and were done with the view of furthering that business.¹² For instance, the responsibility of a railroad company for wrongfully placing a snow fence upon abutting property is established by the fact that the work was done under orders of its foreman in charge of that section of the road.¹³

While many authorities have recognized the liability of a master in trespass for the acts of a servant when committed in the course of employment,¹⁴

7. *Du Bose v Marx*, 52 Ala 506; *Snow v Chandler*, 10 NH 92; *Ellis v Essau*, 50 Wis 138, 6 NW 518.

As to release of joint tortfeasors, generally, see 66 Am Jur 2d, Release §§ 37 et seq.

For discussion of satisfaction, generally, as among and between joint tortfeasors, see 1 Am Jur 2d, Accord and Satisfaction § 9.

8. 66 Am Jur 2d, Release § 38.

9. *Snow v Chandler*, 10 NH 92.

10. *Jersey City Redevelopment Authority v PPG Industries* (DC NJ) 655 F Supp 1257, 17 ELR 20763, later proceeding (DC NJ) 18 ELR 20364 and affd (CA3) 1988 US App LEXIS 18998.

11. *Lockhart v Friendly Finance Co.* (Fla App D1) 110 So 2d 478, cert den (Fla) 114 So 2d 5.

As to a master's liability for the wrongs of employees to third persons, generally, see 53 Am Jur 2d, Master and Servant §§ 404 et seq.

12. *Lockhart v Friendly Finance Co.* (Fla App D1) 110 So 2d 478, cert den (Fla) 114 So 2d 5; *Waler v Great N.R. Co.*, 22 SD 256, 117 NW 140; *Andrus v Howard*, 36 Vt 248.

13. *Waler v Great N.R. Co.*, 22 SD 256, 117 NW 140.

14. *Central of G.R. Co. v Brown*, 113 Ga 414, 38 SE 989; *McClung v Dearborne*, 134 Pa 396, 19 A 698; *Andrus v Howard*, 36 Vt 248.

As to the liability of an employer for the trespass of an independent contractor, see 41 Am Jur 2d, Independent Contractors § 44.

without distinction between intentional wrongs and negligent acts,¹⁵ there is authority for the view that in the case of a wilful trespass, unless express direction and command on the part of the master is shown, his liability is, at most, in trespass on the case and not in trespass.¹⁶

The knowledge and conduct of a servant may be imputed to the master where the actor has notice he is committing a trespass,¹⁷ as where the defendant's equipment operator proceeds to destroy trees and vegetation on the plaintiff's land, after being told by the plaintiff's tenant that he was grading the wrong land, regardless of such notice.¹⁸ An exception is where the employer is ignorant of the trespass, is not interested in the work except as security for monetary advances, and has no voice in directing the workmen.¹⁹

§ 71. —Corporate officer or agent

A corporation may be held liable for trespass committed by its officers or agents, in the course of their employment, upon the lands, personal property, or person of another.²⁰ However, if a trespass is committed by the agent or officer wilfully or of his own malice, under color of discharging the duties of his employment, or if he departs beyond the line of his duty to commit a trespass, the corporation will not be liable.²¹

An officer or agent of a corporation is individually liable for his or her acts constituting a trespass. Thus, an officer or agent of a corporation is personally liable for trespass in wrongfully ejecting a passenger from a railway car²² or for a trespass on land which he directs or procures.²³

If a corporation, by its president acting for it, trespasses on the land of another, both the corporation and the president are liable, either jointly or severally,²⁴ while it has elsewhere been held that the liability in such circumstances is joint.²⁵

15. *Richberger v American Exp. Co.*, 73 Miss 161, 18 So 922.

16. *Thames S.B. Co. v Housatonic R. Co.*, 24 Conn 40; *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 252.

For discussion of trespass on the case, generally, see § 7.

17. *Ingram v Summerlin*, 179 Ga App 832, 348 SE2d 68; *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008.

Forms: Notice to trespasser—Request to discontinue trespass. 17 Am Jur Legal Forms 2d, Trespass, § 249:4.

18. *Ingram v Summerlin*, 179 Ga App 832, 348 SE2d 68.

19. *Swackhamer v Johnson*, 39 Or 383, 65 P, 91.

As to right to indemnification of a person compelled to pay for another's wrong, see 41 Am Jur 2d, Indemnity § 20.

20. *Russell v American Rock Crusher Co.*, 181 Kan 891, 317 P2d 847; *Ramsden v Boston & A.R. Co.*, 104 Mass 117.

As to liability of corporations, and the role of respondeat superior, generally, see 18 Am Jur 2d, Corporations §§ 2124 et seq.

Annotations: Liability of member of unincorporated association for tortious acts of association's nonmember agent or employee, 62 ALR3d 1165.

21. *St. Louis, I.M. & S.R. Co. v Hackett*, 58 Ark 381, 24 SW 881; *Brokaw v New Jersey R. & T. Co.*, 32 NJL 328; *Rounds v Delaware, L. & W.R. Co.*, 64 NY 129.

22. *Holmes v Wakefield*, 94 Mass 580; *Moore v Fitchburg R. Corp.*, 70 Mass 465.

23. *Peck v Cooper*, 112 Ill 192; *Favorite v Cottrill*, 62 Mo App 119.

24. *Bates v Van Pelt*, 1 Tex Civ App 185, 20 SW 949.

25. *Favorite v Cottrill*, 62 Mo App 119.

§ 72. Principal and agent

A principal may be held liable for a trespass by his agent within the scope of the agent's authority or employment.²⁶

■■■■ Comment: An agent who assists another agent or the principal to commit a trespass is normally liable as a joint tortfeasor for the entire damage, except where good faith creates a privilege to act.²⁷

An agent cannot escape or exempt himself from liability to a third person for a trespass, merely because of his relationship as an agent and the fact that he has acted at the command of his principal.²⁸

Where an agent commits a trespass, a principal, after being fully informed of the trespass, may adopt it as his own act and such ratification ordinarily binds the principal to the same extent as if he had originally authorized it.²⁹

In the case of a trespass committed by an agent which imposes liability upon his principal, the latter need not be joined as a party defendant with the agent, but either may be sued separately or jointly at the election of the party injured.³⁰

§ 73. —Independent contractor

One who employs an independent contractor to do work, which the employer knows or has reason to know is likely to involve a trespass upon the land of another, is subject to liability for the harm resulting to others from such trespass.³¹

■■■■ Illustration: The trial court properly dismissed a trespass action against an adjoining property owner and a nursery, which he hired to remove trees from the plaintiff's property, the action against the nursery in and holding the defendant fully liable for the damage, where the defendant had informed the nursery that it owned the subject property when directing it to remove the trees therefrom evincing overwhelming proof that the injury was caused by the defendant's intentional and willful actions.³²

■■■■ Caution: Where an injury to another's land results from the work of an independent contractor, the employer may be equitably estopped from

26. *Raisler v Springer*, 38 Ala 703.

As to tort liability on a principal for the acts of his agent, generally, see 3 Am Jur 2d, Agency §§ 298 et seq.

27. Restatement, Agency 2d § 343, Comment d.

28. *Mitchell v Harmony*, 54 US 115, 14 L Ed 75 (ovrld on other grounds by *Pennhurst State School & Hospital v Halderman*, 465 US 89, 79 L Ed 2d 67, 104 S Ct 900, later proceeding (ED Pa) 610 F Supp 1221, later proceeding (ED Pa) 633 F Supp 919, later proceeding (ED Pa) 1987 US Dist LEXIS 11020, later proceeding (ED Pa) 1989 US Dist LEXIS 10147, later proceeding (ED Pa) 725 F Supp 861, affd (CA3 Pa) 901 F2d 311, cert den (US) 112 L Ed 2d 107, 111 S Ct 140, later proceeding (ED Pa) 1991 US Dist LEXIS 4925; *Blaen Avon Coal*

Co. v McCulloh, 59 Md 403; *Livingston v Bishop* (NY) 1 Johns 290.

29. § 68.

30. *Blondell v Consolidated Gas Co.*, 89 Md 732, 43 A 817.

31. *Jersey City Redevelopment Authority v PPG Industries* (DC NJ) 655 F Supp 1257, 17 ELR 20763, later proceeding (DC NJ) 18 ELR 20364 and affd (CA3) 1988 US App LEXIS 18998; *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 252; *Kopka v Bell Tel. Co.*, 371 Pa 444, 91 A2d 232.

As to the liability of an independent contractor for work involving a trespass, generally, see 41 Am Jur 2d, Independent Contractors § 44.

32. *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 252.

pleading the relationship as a defense if he has concealed it from the injured landowner.³³

IV. DEFENSES [§§ 74-109]

A. AVAILABILITY OF PARTICULAR DEFENSES [§§ 74-80]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass §§ 11-14

Index to Annotations: Defenses; Res Judicata; Restatement of Torts; Trespass

23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 55, 57

Restatement, Torts 2d §§ 887-895

Speiser, Krause, and Gans, The American Law of Torts § 23:28

§ 74. Generally

When one commits a trespass upon the person or property of another, whether intentional or unintentional, there are few defenses which will excuse and relieve him from liability.³⁴

Thus, for instance, one cannot defend a trespass to the property of another on the ground that it constitutes a public nuisance.³⁵ Furthermore, because the intent with which an act is done is not a test of liability in trespass,³⁶ neither a mistake of law or fact³⁷ nor the absence of bad faith on the part of the defendant will excuse a trespass.³⁸ Ignorance does not excuse an entry upon the land of another;³⁹ thus, one cannot defend a trespass by showing lack of knowledge of the location of the boundary lines,⁴⁰ even when the owner has failed to erect any artificial markings of his boundaries.⁴¹

Since the liability of a cotrespasser is that of a principal,⁴² it is no defense as to one cotrespasser that the injury was greater than he intended or that the particular act was not contemplated or intended by him.⁴³

Possession of property for an illegal purpose is not a justification for a trespass to it;⁴⁴ nor is it a defense to an action for damages in trespass that the

33. § 82.

34. *Gordon Creek Tree Farms, Inc. v Layne*, 230 Or 212, 368 P2d 737 (not followed on other grounds by *Fredeen v Stride*, 269 Or 369, 525 P2d 166); *Cunningham v Pitzer*, 2 W Va 264.

For a discussion of defenses applicable to tort claims, generally, see *Restatement, Torts* 2d, Chapter 45, §§ 887-895.

35. *Watts v Norfolk & W.R. Co.*, 39 W Va 196, 19 SE 521.

36. § 9.

37. § 11.

38. *Poggi v Scott*, 167 Cal 372, 139 P 815; *Schultz v Frankfort M.A. & P.G. Ins. Co.*, 151 Wis 537, 139 NW 386.

Forms: Answer—Defense—In mitigation of damages—Defendant's good-faith belief in

rightfulness of his acts. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 57.

39. § 11.

40. *Little Pittsburg Con. Min. Co. v Little Chief Con. Min. Co.*, 11 Colo 223, 17 P 760; *Boulton v Telfer*, 52 Idaho 185, 12 P2d 767, 83 ALR 1341, cert den 287 US 655, 77 L Ed 565, 53 S Ct 115; *J. F. Ball & Bro. Lumber Co. v Simms Lumber Co.*, 121 La 627, 46 So 674.

41. *Cosgriff v Miller*, 10 Wyo 190, 68 P 206.

42. § 66.

43. *Kirkwood v Miller*, 37 Tenn 455.

Forms: Answer—Defense—Reliance on survey. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 55.

44. *Love v Moynehan*, 16 Ill 277 (trespass to chattel in bawdy house); *Gulf, C. & S.F.R. Co. v Johnson*, 71 Tex 619, 9 SW 602.

trespasser has possessed the property for a year.⁴⁵

§ 75. Direction, order, or authorization of third person

A trespasser cannot relieve himself from liability by showing that a third person, including an attorney,⁴⁶ directed, ordered, or authorized him to do the alleged act.⁴⁷

However, in some instances authority given by law is such as to constitute the basis of a privilege relieving a trespasser from liability.⁴⁸

§ 76. Duress

In order for a defendant to escape liability on the ground that he was forced to commit a trespass, it is incumbent upon him to show that he had no reasonable means of escaping from the force and fear after they were applied to him and before the trespass was committed.⁴⁹

Contributory negligence is not a proper defense to trespass,⁵⁰ although it is a factor in determining whether an actor was privileged to enter land to reclaim a chattel.⁵¹

§ 77. Infancy

As in the case of other torts,⁵² infancy is not a defense to liability in trespass.⁵³ The tender age of a child will not protect him from liability if his act is denominated a trespass.⁵⁴

■■■■ Reminder: While the age of a child will not protect him from liability if his act is denominated a trespass, since trespass is an intentional tort, an

45. *Owens v Smith* (La App 2d Cir) 541 So 2d 950.

46. *Havemeyer v Superior Court of San Francisco*, 87 Cal 267, 25 P 433 (the advice of counsel, even though acted on in good faith, will not relieve a trespasser from liability).

47. *Mitchell v Harmony*, 54 US 115, 14 L Ed 75 (ovrld on other grounds by *Pennhurst State School & Hospital v Halderman*, 465 US 89, 79 L Ed 2d 67, 104 S Ct 900, later proceeding (ED Pa) 610 F Supp 1221, later proceeding (ED Pa) 633 F Supp 919, later proceeding (ED Pa) 1987 US Dist LEXIS 11020, later proceeding (ED Pa) 1989 US Dist LEXIS 10147, later proceeding (ED Pa) 725 F Supp 861, affd (CA3 Pa) 901 F2d 311, cert den (US) 112 L Ed 2d 107, 111 S Ct 140, later proceeding (ED Pa) 1991 US Dist LEXIS 4925); *Elmore v Fields*, 153 Ala 345, 45 So 66; *Blaen Avon Coal Co. v McCulloh*, 59 Md 403.

The advice of counsel is not a defense to liability for statutory multiple damages. *Ward v Rapp*, 79 Mich 469, 44 NW 934; *Chilton v Missouri Lumber & Mining Co.*, 144 Mo App 315, 127 SW 941.

As to the vicarious liability of one for the acts of trespass of an employee, agent, officer, or contractor, see §§ 70 et seq.

48. §§ 83 et seq.

49. *Cunningham v Pitzer*, 2 W Va 264.

50. *Smith v McCullough Dredging Co.* (Fla App D3) 152 So 2d 194, cert den (Fla) 165 So 2d 178; *Leonard v Nat Harrison Associates, Inc.* (Fla App D2) 122 So 2d 432.

An action by the owners of land against a contractor for the unauthorized removal of earth from their property is not subject to the defense of contributory negligence in failing to erect monuments, fences, or signs to establish and mark the boundaries of their land. *Derbofen v T. L. James & Co.* (La App 4th Cir) 148 So 2d 795, 1 ALR3d 793.

51. § 108.

52. 42 Am Jur 2d, Infants § 140.

53. *Heller v New York, N.H. & H.R. Co.* (CA2 NY) 265 F 192, 17 ALR 823.

54. *Farm Bureau Mut. Ins. Co. v Henley*, 275 Ark 122, 628 SW2d 301; *Cleveland Park Club v Perry* (Mun Ct App Dist Col) 165 A2d 485; *Fett v Sligo Hills Development Corp.*, 226 Md 190, 172 A2d 511; *Brown v Dellinger* (Tex Civ App Texarkana) 355 SW2d 742, writ ref n r e.

For a discussion of the liability of infants for torts, generally, see 42 Am Jur 2d, Infants §§ 140-144.

Annotations: Modern trends as to tort liability of child of tender years, 27 ALR4th 15 § 6[a].

initial determination must be made whether the child formed the intent to do the physical act which released the harmful force, and it cannot be said as a matter of law that a child of any age is incapable of intending to do a physical act.⁵⁵

§ 78. Laches; statutes of limitations

Laches is an equitable principal and is a defense only to suits in equity;⁵⁶ thus, since a trespass action is an action at law, laches is not a proper defense to trespass.⁵⁷

The statute of limitations may be pleaded as an affirmative defense to an action alleging a trespass⁵⁸ or a continuing trespass,⁵⁹ and, on appeal of a dismissal of the complaint on the defendant's motion based on the action being barred by a statute of limitations, the burden is on the appellee to show his entitlement to the defense and that the defense is meritorious.⁶⁰

§ 79. Res judicata

The fact that the subject matter of an action of trespass has been adjudicated in another action is a bar to a suit in trespass.⁶¹ For instance, a recovery for use and occupation, in an action to recover possession of the land, is a bar to a subsequent action for injuries to the estate during the same period of occupation.⁶² But, separate suits may be brought for successive trespasses,⁶³ and a judgment in a former trespass action will not bar subsequent actions for later injuries.⁶⁴ Thus, several actions cannot be maintained to recover damages for a single and completed trespass upon and injury to the entire tract of land, and a recovery of damages in respect to a portion of the land will bar a subsequent recovery for the same tract, the cause of action being entire and indivisible.⁶⁵

■■■■ Observation Criminal punishment of a trespass constituting both a

55. § 9.

56. As to laches as a bar to equitable relief, generally, see 27 Am Jur 2d, Equity §§ 152 et seq.

57. *MacWillie v Southeast Alabama Gas Dist.* (Ala) 539 So 2d 245.

58. *MacWillie v Southeast Alabama Gas Dist.* (Ala) 539 So 2d 245.

As to pleading affirmative defenses, generally, including the statute of limitations, generally, in a trespass action, see § 212.

For discussion of applicability of statutes of limitations to trespass actions, generally, see § 200.

59. *Wimmer v Ft. Thomas* (Ky App) 733 SW2d 759; *Elk Garden Big Vein Coal Mining Co. v Gerstell*, 95 W Va 471, 121 SE 569, 33 ALR 298.

60. *Wimmer v Ft. Thomas* (Ky App) 733 SW2d 759.

61. *Rollins v Blackden*, 112 Me 459, 92 A

521; *Pierro v St. Paul & N.P.R. Co.*, 38 Minn 451, 40 NW 520; *Hite v Long*, 27 Va 457.

62. *Pierro v St. Paul & N.P.R. Co.*, 38 Minn 451, 40 NW 520.

For discussion of res judicata as distinguished from estoppel, generally, see 46 Am Jur 2d, Judgments § 398.

63. § 114.

64. *McConnel v Kibbe*, 33 Ill 175; *Executors of Stevens v Hollister*, 18 Vt 294.

As to the general rule that injuries resulting from separate and distinct tortious acts necessarily give rise to separate causes of action, see 1 Am Jur 2d, Actions § 151.

65. *Pierro v St. Paul & N.P.R. Co.*, 38 Minn 451, 40 NW 520.

A judgment for mesne profits will not bar an action of trespass to real property to recover damages for a removal of a fence from the land. *Gill v Cole* (Md) 1 Harr & J 403.

As to damages in action for trespass, generally, see §§ 117 et seq.

civil injury and a penal offense does not bar a subsequent action for the private wrong.⁶⁶

§ 80. Other statutory defenses

A legislature may reasonably decide, as a matter of policy, and without violating the right to equal protection under the law, that the greater culpability of criminal trespass be afforded affirmative defenses, while the less culpable act of simple trespass, an infraction subject to only a fine, receive no such benefit.⁶⁷ Further, a legislature also may preclude on a rational basis any defense to a trespass under a statute which denominates the offense to be one of strict or absolute liability.⁶⁸

It is an affirmative defense to prosecution for criminal trespass if the actor reasonably believed that the owner of the premises would have licensed him to enter, so long as the actor's belief is reasonable, that is, one which the actor is neither reckless nor negligent in holding.⁶⁹ For instance, a statute may provide an affirmative defense to prosecution for trespass by unlicensed entry of structures, where the structure involved in the offense was abandoned, or was open at the time of the alleged trespass to members of the public, and where the actor complied with all lawful conditions imposed on access or where the actor reasonably believed that the owner of the structure or other person empowered to license access thereto, would have licensed him to enter or remain.⁷⁰

B. ESTOPPEL [§§ 81, 82]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass § 11

Index to Annotations: Defenses; Estoppel and Waiver; Restatement of Torts; Trespass

23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 23

Speiser, Krause, and Gans, *The American Law of Torts* § 23:30

66. *Cotton v United States*, 52 US 229, 13 L Ed 675.

For discussion of criminal liability for trespass, generally, see §§ 162 et seq.

As to the rule that a judgment in a criminal prosecution is not a bar to a subsequent civil action arising from the same transaction, see 46 Am Jur 2d, Judgments § 614.

67. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

68. *State v Hunt* (Mo App) 630 SW2d 211.

69. *Warfield v State*, 315 Md 474, 554 A2d 1238; *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216.

A statutory defense of excuse, to prosecution for defiant trespass, on the basis that the subject premises were at the time open to members of the public and the actor complied with

all lawful conditions imposed on access to or remaining in the premises, was unavailable to a defendant, unaffiliated in any way with the university law school, except for the receipt of a library card, who was denied access to the school's law library during the examination period, when the facilities were closed to all but school faculty and law students, where the evidence clearly established that nonstudents or nonuniversity affiliates could gain access to the library only if they asked for and obtained a library pass, which was revocable at the school's pleasure; thus, the law library was not open to members of the public within the meaning of the statutory defense to prosecution for defiant trespassing. *Commonwealth v Downing*, 511 Pa 28, 511 A2d 792.

For discussion of criminal liability for trespass, generally, see §§ 162 et seq.

70. *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216.

§ 81. Generally

The doctrine of estoppel may be raised in defense to an action for trespass.⁷¹ A landowner is not equitably estopped, in an action for trespass, from revoking a license granted for a specified purpose, and thus a limited duration of time, notwithstanding improvements made on the property by the licensee, where the parties fully manifested an intention to limit the duration of the right of passage, since it is the duty of the courts to enforce that limitation and not to disregard it by giving a perpetual right where only a determinable one was intended.⁷²

Equitable estoppel arises, in a trespass action, when an individual by his acts, representations, admissions, or by his silence when he has a duty to speak, intentionally or through culpable negligence, induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his detriment.⁷³ Reliance is a requisite to estoppel as a defense to trespass.⁷⁴

■■■■ Illustration: Where defendants were informed of the plaintiff's objections to their location of a boundary as soon as some of the slips were placed in the water on the plaintiff's bottom land, and defendant went ahead and completed the first and second boathouse, even after the plaintiff brought suit for trespass, it was clear defendants did not rely to their detriment on plaintiffs' actions or inaction.⁷⁵

§ 82. Limitations on estoppel defense

While estoppel is undoubtedly a defense to an action of trespass,⁷⁶ because each case must stand on its own merits, it is impossible to lay down fixed and settled rules as to just what circumstances are sufficient⁷⁷ or insufficient to estop one from complaining of a trespass.⁷⁸ Because reliance is a requisite to

71. *Merrill Stevens Dry Dock Co. v G & J Invest. Corp.* (Fla App D3) 506 So 2d 30, 12 FLW 1048, review den (Fla) 515 So 2d 229; *Clipper Min. Co. v Eli Mining & Land Co.*, 29 Colo 377, 68 P 286, affd 194 US 220, 48 L Ed 944, 24 S Ct 632; *Rogers v Portland & B.S.R. Co.*, 100 Me 86, 60 A 713; *Steel Creek Development Corp. v Smith*, 300 NC 631, 268 SE2d 205, later app 58 NC App 506, 294 SE2d 23, petition den 306 NC 740, 295 SE2d 763.

As to estoppel, generally, see 28 Am Jur 2d, *Estoppel and Waiver*.

72. *Merrill Stevens Dry Dock Co. v G & J Invest. Corp.* (Fla App D3) 506 So 2d 30, 12 FLW 1048, review den (Fla) 515 So 2d 229.

73. *Steel Creek Development Corp. v Smith*, 300 NC 631, 268 SE2d 205, later app 58 NC App 506, 294 SE2d 23, petition den 306 NC 740, 295 SE2d 763.

74. *Storey v Patterson* (Ala) 437 So 2d 491.

75. *Steel Creek Development Corp. v Smith*, 300 NC 631, 268 SE2d 205, later app 58 NC App 506, 294 SE2d 23, petition den 306 NC 740, 295 SE2d 763.

76. § 81.

77. *Inglis v Millersburg Driving Ass'n.*, 169 Mich 311, 136 NW 443 (where an injury to another's land results from the work of an independent contractor, the employer cannot plead the relationship as a defense if he has concealed it from the injured landowner).

78. *Merrill Stevens Dry Dock Co. v G & J Invest. Corp.* (Fla App D3) 506 So 2d 30, 12 FLW 1048, review den (Fla) 515 So 2d 229; *Pearson v Inlow*, 20 Mo 322; *Phillips v Hall* (NY) 8 Wend 610; *Steel Creek Development Corp. v Smith*, 300 NC 631, 268 SE2d 205, later app 58 NC App 506, 294 SE2d 23, petition den 306 NC 740, 295 SE2d 763.

Permission given by a landholder to place telegraph lines and poles on a highway does not estop him from objecting to the cutting off of trees on such highway in order to facilitate the stringing of wire. *Dailey v State*, 51 Ohio St 348, 37 NE 710.

As to consent in defense of an action for trespass, see §§ 84 et seq.

estoppel as a defense to trespass,⁷⁹ the failure to object to another's encroachment on one's soil or rights, equally well known or equally open to the notice of both parties, will not operate as an estoppel.⁸⁰ Thus, a mere prolonged occupation by a limited licensee, who made improvements to the property,⁸¹ or a trespasser on the land of another with the latter's knowledge,⁸² if continued for less than the period of limitations, will not estop the true owner from maintaining an action for the trespass.

One in the possession of real property is estopped to maintain an action for trespass to which he has consented.⁸³

C. PRIVILEGE [§§ 83-109]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass §§ 11, 13

Index to Annotations: Defenses; Restatement of Torts; Trespass

23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 21, 26, 52-54, 56, 57

6 Am Jur POF 548, Proof No. 3, Invitee's Disregard of Sign; 28 Am Jur POF2d 703, Permissive Use of Land

Restatement, Torts 2d §§ 100-111, 167-191, 195-211, 262-264, 892-892D

Speiser, Krause, and Gans, The American Law of Torts § 23:29

1. IN GENERAL [§ 83]

§ 83. Effect and source of privileges

Conduct which would otherwise constitute a trespass is not a trespass if it is privileged.⁸⁴ privileges may derive from a transaction between the parties or their predecessors in interest, as by consent,⁸⁵ irrevocable license, and privileges derived from the actor's interest in the land, such as, an easement.⁸⁶

■■■■ Reminder: Since the intention required to make the actor liable for trespass is an intention to enter upon the particular piece of land in question, irrespective of whether the actor knows or should know that he is not entitled to enter, it is immaterial whether he honestly and reason-

79. § 81.

80. Cityco Realty Co. v Slaysman, 160 Md 357, 153 A 278, 76 ALR 296 (ovrld on other grounds by Travelers Indem. Co. v Nationwide Constr. Corp., 244 Md 401, 224 A2d 285) and (ovrld on other grounds by Bean v Steuart Petroleum Co., 244 Md 459, 224 A2d 295) as stated in Zimmerman v Summers, 24 Md App 100, 330 A2d 722.

Forms: Complaint, petition, or declaration—Allegation—Encroachment. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 23.

81. Merrill Stevens Dry Dock Co. v G & J Invest. Corp. (Fla App D3) 506 So 2d 30, 12 FLW 1048, review den (Fla) 515 So 2d 229.

Annotations: Private improvement of land dedicated but not used as street as estopping public rights, 36 ALR4th 625.

82. Woll v Voigt, 105 Minn 371, 117 NW 608.

Where a pipe line is unlawfully constructed on a public highway without the knowledge or consent of the owner of the fee therein, the fact that after such construction he made no objection to it or its maintenance does not estop him from maintaining an action for the trespass of the constructor in removing the pipe line. Huffman v State, 21 Ind App 449, 52 NE 713.

83. Rogers v Portland & B.S.R. Co., 100 Me 86, 60 A 713.

84. Restatement, Torts 2d, Ch 7, § 158, Comment e.

85. §§ 84 et seq.

86. Restatement, Torts 2d, Chapter 8, §§ 167-190.

ably believes that he has the consent of the possessor or of a third person having power to give consent on his behalf, or that he has a mistaken belief that he has some privilege to enter.⁸⁷

Irrespective of any transaction between the parties, privileges may arise such as the privilege to enter to abate a nuisance, to act out of necessity, or to reclaim or remove chattel on the property.⁸⁸

2. PRIVILEGES BASED ON CONSENT OR LICENSE [§§ 84-91]

§ 84. Generally

A peaceable entry on land by consent is not actionable.⁸⁹ Where there is a consensual entry onto the land or property of another, there is no trespass, because lack of consent is an element of the theory underlying the tort.⁹⁰

Consent from the owner of land is an absolute⁹¹ and valid defense to an action of trespass,⁹² for acts done within the scope of the license,⁹³ even though given under a mutual mistake of fact⁹⁴ or, in some cases, misrepresentation.⁹⁵

87. § 11.

88. Restatement, Torts 2d, Chapter 8 §§ 196-203.

89. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

90. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

In an action for an alleged breach of implied contract by the plaintiff to recover costs for repair to a dam on plaintiff's property from the defendant contractor, where the contractor's employee in making the repairs, invaded the physical condition of the adjoining property resulting in a counterclaim against the plaintiff for trespass, the plaintiff's defense of consent was of no merit where, prior to the excavation, the cross-claimants informed the plaintiffs they did not consider themselves responsible for the costs of repairs to the plaintiffs' property and stated they did not want the contractor's employee excavating on their property. *Knaus v Dennler* (5th Dist) 170 Ill App 3d 746, 121 Ill Dec 401, 525 NE2d 207, app den 122 Ill 2d 576, 125 Ill Dec 219, 530 NE2d 247.

Restatement, Torts 2d §§ 892-892D, Defenses Applicable to Tort Claims.

For discussion of consent as applicable to tort law, generally, see 74 Am Jur 2d, Torts § 49.

91. *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

As to the general rule that one may not maintain an action for a wrong to which he has consented, see 1 Am Jur 2d, Actions § 53.

92. *Arguelles-Vasquez v Immigration & Naturalization Service* (CA9) 800 F2d 223, later proceeding (CA9) 820 F2d 1112, later proceeding (CA9) 828 F2d 5; *Dubuque Fire & Marine Ins. Co. v Union Compress & Warehouse Co.* (DC La) 143 F Supp 128, motion den (DC La) 146 F Supp 482; *McCaig v Talladega Pub. Co.* (Ala) 544 So 2d 875, 16 Media L R 1946; *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600; *Sheftall v Zipperer*, 133 Ga 488, 66 SE 253; *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176; *Bennett v McIntire*, 121 Ind 231, 23 NE 78.

As to the general rule that one may not maintain an action for a wrong to which he has consented, see 1 Am Jur 2d, Actions § 53.

As to the scope of consent, generally, see § 88.

93. § 88.

94. *Dubuque Fire & Marine Ins. Co. v Union Compress & Warehouse Co.* (DC La) 143 F Supp 128, motion den (DC La) 146 F Supp 482.

Where the defendant, mistaking a lot for his own, takes sand therefrom, and the owner mistakenly permits him to do so, trespass does not lie. *Merriwether v Bell*, 139 Ky 402, 58 SW 987.

95. *North v Williams*, 120 Pa 109, 13 A 723 (the mere fact that an entry is gained by misrepresentation does not constitute it a trespass where a right of entry has previously been granted to the entrant).

As to mistake and misrepresentation sufficient to invalidate consent, see § 90.

■■■■ *Practice guide:* Where the petition, in an action for trespass, alleges damages by reason of the injury done to the property after the defendant's entrance on the property, lack of consent need not be proved.⁹⁶

§ 85. Entry on real property to remove chattel or fixture

A number of privileges apply to protect from trespass one who removes a chattel or a fixture from land in the possession of another, there by virtue of a prior consent or license by the possessor or his predecessor in interest, at a reasonable time, in a reasonable manner, and with reasonable promptness, including the privilege of—

- A former licensee to remove things from the land originally placed there with consent which is subsequently terminated or suspended;⁹⁷
- A former tenant leaving land after a reversioner or remainderman has taken possession;⁹⁸
- A tenant of land or his successor in interest who is entitled after the expiration of the tenancy to a crop planted by the tenant during the tenancy;⁹⁹
- A tenant of land or his successor in interest who is entitled at the expiration of the tenancy to a structure or other thing erected on or affixed to the land during the tenancy;¹
- Transferees, transferors, conditional vendors, lessors, chattel mortgagees, pledgors, mortgagors, and bailors with reserved rights and interests in a thing on the subject land.²

A possessor of land who, or whose predecessor in legal interest, has consented to another's placing or leaving a thing there on condition that the other remove it thereafter, which the other has unreasonably failed to remove, is privileged, at a reasonable time and in a reasonable manner, to enter land in the possession of the other in order to place the thing there and so rid himself of it.³ Where property is placed on the premises under a oral license from the owner of the land, no right of removal exists.⁴

■■■■ *Distinction:* The privilege of an actor to enter land in the possession of another for the purpose of removing a chattel therefrom is distinct from the privilege of an actor to enter land in the possession of another, for the purpose of relieving his own land of a chattel, which has come upon the land otherwise than with his consent or by his tortious conduct or contributory negligence, in that the privilege to remove a thing tortiously placed on the land does not arise from any transaction between the parties or their predecessors in interest.⁵

96. *Stone Resources, Inc. v Barnett* (Tex App Houston (1st Dist)) 661 SW2d 148.

As to declaration, petition, or complaint in an action for trespass, generally, see § 205.

97. Restatement, Torts 2d § 177.

98. Restatement, Torts 2d § 178.

99. Restatement, Torts 2d § 179.

1. Restatement, Torts 2d § 180.

2. Restatement, Torts 2d §§ 182-183.

3. Restatement, Torts 2d § 184.

4. *Ricker v Kelly*, 1 Me 117.

For discussion of termination of an oral license by a transfer of possession, see § 91.

As to the privilege to remove chattel tortiously placed on the land, generally, as distinct from chattel originally placed on the land with consent or license, see § 106.

Forms: Answer—Defense—Entry to reclaim chattel. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 53.

5. § 106.

■■■■ *Distinction:* Also distinct is the privilege of recaption of a chattel by its owner from the possession of another, where the chattel is on another's land without the consent, tortious conduct, or contributory negligence of its owner.⁶

§ 86. Who may consent

Consent, to be a valid defense to an action for trespass, must be granted by one in possession,⁷ by one entitled to possession of the premises,⁸ or by one otherwise competent and authorized to give such consent.⁹

§ 87. Implied consent

Consent sufficient to constitute a defense to trespass may be implied from custom, usage, or conduct.¹⁰ For instance, habitual acquiescence in a trespass may constitute a license for persons to enter upon the land if the tolerance is so pronounced as to be tantamount to permission.¹¹ Such consent continues until revoked.¹² When a business, public facility, or common area is open to the public, a person who enters the facility, at a reasonable time and in a reasonable manner, has the implied consent of the owner or the possessor to be there, and so long the person engages in no acts inconsistent with the purposes of the business or facility, there is no trespass.¹³

Notwithstanding that one who remains in a home after being directed to leave is guilty of a wrongful entry and becomes a trespasser even though the original entry was peaceful and authorized,¹⁴ where a homeowner has not indicated that he does not want to receive peddlers or solicitors, the custom is that they have implied consent to call.¹⁵

6. § 108.

7. *Dubuque Fire & Marine Ins. Co. v Union Compress & Warehouse Co.* (DC La) 143 F Supp 128, motion den (DC La) 146 F Supp 482; *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832; *Maryland Tel. & Tel. Co. v Ruth*, 106 Md 644, 68 A 358.

8. *Dubuque Fire & Marine Ins. Co. v Union Compress & Warehouse Co.* (DC La) 143 F Supp 128, motion den (DC La) 146 F Supp 482; *Maryland Tel. & Tel. Co. v Ruth*, 106 Md 644, 68 A 358.

The holder of a second mortgage on real property was not liable in trespass to a joint owner of the subject realty for entering upon and managing the property where he did so with the acquiescence and consent of a joint owner of the property under circumstances which adequately protected the interests of both joint owners. *Wilson v Southern Discount Co.* (Fla App D3) 385 So 2d 169.

9. *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

10. *Dubuque Fire & Marine Ins. Co. v Union Compress & Warehouse Co.* (DC La) 143 F Supp 128, motion den (DC La) 146 F Supp 482; *McCaig v Talladega Pub. Co.* (Ala) 544 So

2d 875, 16 Media L R 1946; *Prior v White*, 132 Fla 1, 180 So 347, 116 ALR 1176; *St. Louis County v Stone* (Mo App) 776 SW2d 885.

A license to do an act which might otherwise be regarded as a trespass may arise by custom. *The S. B. New World v King*, 57 US 469, 14 L Ed 1019.

As to the creation of license by implication, see 25 Am Jur 2d, Easements and Licenses § 124.

Forms: Answer—Defense—Implied consent—Entry pursuant to agreement to maintain fence. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 54.

11. *Sumner v Hebenstreit* (5th Dist) 167 Ill App 3d 881, 118 Ill Dec 888, 522 NE2d 343.

12. *St. Louis County v Stone* (Mo App) 776 SW2d 885.

As to revocation of consent, see § 91.

13. *St. Louis County v Stone* (Mo App) 776 SW2d 885.

As to termination and revocation of consent, generally, see § 91.

14. § 50.

15. 60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 101.

■■■■ *Practice guide:* Where a defendant relies on a license or consent by a former owner as a defense to an action for continuing trespass, the burden of showing the license or consent is on the defendant.¹⁶

§ 88. Scope of consent

Consent from the owner of land is a valid defense to an action of trespass for acts done within the scope of the license.¹⁷ Thus, in order for consent to be a valid defense to trespass, the acts of the party accused of trespass must not exceed, nor conflict with, the purposes for which such consent was given.¹⁸

Permission to accomplish any particular enterprise carries with it authority to do all that is necessary to effect the principal object,¹⁹ and a consent to the conduct of another is effective for all consequences of the conduct and for the invasion of any interests arising from it.²⁰

§ 89. —Conditional or restricted consent

A conditional or restricted consent to enter land creates a privilege to do so only in so far the actor complies with the condition or restriction.²¹

A consent given by a possessor of land to the actor's presence on a part of the land does not create a privilege to enter or remain on any other part.²² Similarly, consent to an entry on property by a person named cannot be

16. *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176.

As to burden of proof in trespass actions, generally, see § 216.

17. *Arguelles-Vasquez v Immigration & Naturalization Service* (CA9) 800 F2d 223, later proceeding (CA9) 820 F2d 1112, later proceeding (CA9) 828 F2d 5; *Dubuque Fire & Marine Ins. Co. v Union Compress & Warehouse Co.* (DC La) 143 F Supp 128, motion den (DC La) 146 F Supp 482; *McCaig v Talladega Pub. Co.* (Ala) 544 So 2d 875, 16 Media L R 1946; *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600; *Sheftall v Zipperer*, 133 Ga 488, 66 SE 253; *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176; *Bennett v McIntire*, 121 Ind 231, 23 NE 78.

18. *Johnson v State* (Ala App) 473 So 2d 607; *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

Where a property owner's consent to an electrical power company to enter and cut trees on its property extended only to the four foot easement around the power companies wires, the trial court correctly concluded that the power company exceeded the scope of the consent by clearing beyond the four foot easement. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

19. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600; *Babcock v Western R.R. Corp.*, 50 Mass 553; *Harris v Gillingham*, 6 NH 9; *Granger v Postal Tel. Co.*, 70 SC 528, 50 SE 193.

The trial court committed reversible error by determining that a landlord trespassed on the tenant's leasehold, by entering the premises during the leasehold to show them to a potential tenant without specific permission from the current tenant, where the lease provided that the landlord, its agents, or representatives, may at reasonable times enter into and upon the premises or any part thereof for the purpose of examining the condition thereof since such language subsumed with it the right to show the premises while examining their condition. *Magliocco v Olson* (Colo App) 762 P2d 681.

Where a declaration of covenants, conditions, and restrictions with respect to a property subdivision provides that the association of the subdivision property owners has the right to enter upon any offending dwelling unit to take such steps as may be necessary to remove or otherwise terminate to abate a violation of the covenants of the declaration, the conduct of the association in removing for sale signs which violated the express terms of restrictive covenants, did not go beyond the right of entry granted to the homeowners in the association nor was unreasonable such to constitute a trespass. *Murphy v Timber Trace Asso.* (Mo App) 779 SW2d 603.

20. Restatement, Torts 2d § 892B(1).

21. Restatement, Torts 2d § 168.

22. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

Restatement, Torts 2d § 169.

extended by inference to justify the unlicensed entry of others.²³ A consent given by a possessor of land to the actor's presence on the land during a specified period of time does not create a privilege to enter or remain on the land at any other time.²⁴

One whose presence on land is pursuant to a consent which is restricted to conduct of a certain sort is a trespasser if he intentionally conducts himself in a different manner.²⁵ Thus, a person who enters an area open to the public, at a reasonable time and in a reasonable manner, has the implied consent of the owner to enter and remain under a limited privilege, and there is no trespass until conduct by the person exceeds the privilege, or the person is requested to leave by an agent or representative of the owner or possessor and refuses to do so such that his continued presence becomes a trespass.²⁶

§ 90. Invalidation of consent; mistake, misrepresentation, duress

If a person is induced to consent by a substantial mistake, concerning the nature of the invasion of his interests or the extent of the harm to be expected from it, and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.²⁷ For instance, where a felon gained access to the home of the victim he subsequently beat to death, on the pretext of using the telephone, his privilege to enter and remain on the premises ended when he decided to commit a felony and went outside the scope of the consent.²⁸

|||| Comment: The conduct that is legally important is consent to the conduct of the actor, rather than to its consequences; thus, the fact that the plaintiff is acting under a unilateral mistake regarding the invasion to be expected from the conduct, and the extent to which harm will follow, does not ineffectuate the consent, if the actor relies upon it and does not know of the mistake.²⁹ For instance, in an action alleging tortious trespass in newsgathering, if the purported consent, upon which the defense is based, was fraudulently induced, there was no consent.³⁰ If, on the other hand, the same plaintiff was found by the jury to have consented to defendant's newsmen to be upon the nonpublic area of business premises at a particular time, any revocation of the consent later in time would have been immaterial.³¹

Whether consent was induced by misrepresentation is, where the evidence is conflicting, a question of fact for the jury.³²

Consent obtained by duress upon the possessor of land exerted by the

23. 25 Am Jur 2d, Easements and Licenses § 125.

24. Restatement, Torts 2d § 170.

25. *Johnson v State* (Ala App) 473 So 2d 607 (by implication); *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

26. *St. Louis County v Stone* (Mo App) 776 SW2d 885.

27. Restatement, Torts 2d § 892B(2).

28. *Johnson v State* (Ala App) 473 So 2d 607.

29. Restatement, Torts 2d § 892B(1), Comment c.

30. *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

As to relief and remedies for fraudulent misrepresentation, generally, see 37 Am Jur 2d, Fraud and Deceit §§ 323 et seq.

31. *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

32. *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

actor, or by a third person to the knowledge of the actor, is not effective as a consent to his entry.³³

§ 91. Termination and revocation of consent

Subject to the privileges of reasonable egress and removal of things,³⁴ the actor's privilege to enter land created by consent of the possessor is terminated by: the doing of any act, or the happening of any event, or the lapse of any specified period of time by which the consent is restricted; by a revocation of the possessor's consent, of which the actor knows or has reason to know; or, by a transfer or other termination of the possessor's possessory interest in the land.³⁵ A defense motion for a directed verdict was improperly granted in an action for trespass against a defendant who refused to remove automobiles, stored upon the plaintiff's land pursuant to an oral license given by the plaintiff's predecessor in interest, where the defendant had no right in the land except a privilege under the oral license, which could be terminated by a transfer of the property.³⁶

The implied consent of one to enter a business, or public facility, open to the public, at a reasonable time and in a reasonable manner,³⁷ is revoked by prolonged, boisterous conduct, breach of the peace, blocking of entranceways, interference with the public, picketing, or other acts inconsistent with the purposes of the business or facility.³⁸

3. PRIVILEGES BASED ON OTHER MATTERS [§§ 92-109]

a. ABATEMENT OF NUISANCE [§ 92]

§ 92. Generally

An entry on land in the possession of another by a possessor of neighboring land is privileged if the entry is made (a) for the purpose of abating a structure or other condition on the land, which constitutes a private nuisance to the actor's possessory interest in the other land, and (b) at a reasonable time and in a reasonable manner, and (c) after the possessor upon demand has failed to abate the nuisance, or without such demand if the actor reasonably believes it to be impractical or useless.³⁹ One to whom a public nuisance causes or threatens special harm is privileged to abate it under the same conditions as a private nuisance.⁴⁰ Although it has been held that one cannot defend a trespass to the property of another on the ground that it constitutes a public nuisance,⁴¹ according to the present weight of authority, an individual may abate a public nuisance only when he has suffered some special injury by

33. Restatement, Torts 2d § 172.

■■■■ **Definition:** Duress is the constraint of another's will by which he is compelled to give consent when he is not in reality willing to do so. Restatement, Torts 2d § 892B, Comment j.

34. § 85

35. Restatement, Torts 2d § 171.

36. *Busada v Ransom Motors, Inc.*, 31 Md App 704, 358 A2d 258.

Annotations: Revocation of license to cut and remove timber as affecting rights in respect

of timber cut but not removed, 26 ALR2d 1194.

37. § 87.

38. *St. Louis County v Stone* (Mo App) 776 SW2d 885.

39. Restatement, Torts 2d § 201.

As to abatement of nuisances, generally, and the requirement of notice where abatement requires entering the property, see 58 Am Jur 2d, Nuisances §§ 411 et seq.

40. Restatement, Torts 2d § 264(2).

41. § 74.

reason of it, that is, when it interferes with, obstructs, or injures his individual rights.⁴²

A public officer who by virtue of his office or by statute is authorized to abate a public nuisance, is privileged, at a reasonable time and in a reasonable manner, to enter land in the possession of another for the purpose of abating such a nuisance.⁴³

One is privileged to commit an act which would otherwise be a trespass to the chattel of another, for the purpose of abating a private nuisance created or maintained by the other, if the act is a reasonable means of abating the nuisance, and if the other upon demand has failed to abate the nuisance, or the actor reasonably believes that such demand is impractical or useless.⁴⁴

■■■■ *Illustration:* Sincerity of motive does not excuse the deliberate violation of a statute which provides that a person commits the offense of criminal trespass when he intentionally damages any property of another without consent, notwithstanding the possibility that the fence infringed upon the sidewalk right of way, allegedly constituting an illegal barricade which the defendant had a right to destroy; the fact that the fence infringed upon the city's right of way did not entitle the defendant to take the law into his own hands, rather than reporting the problem fence to the appropriate regulatory division of the city.⁴⁵

b. TITLE AND RIGHT TO POSSESSION [§ 93]

§ 93. Generally

Ownership, together with a right of possession, is a defense to liability for a trespass.⁴⁶ A person entitled as owner to the immediate possession of land which is in the possession of another, who enters or remains on the land, does not thereby subject himself to liability for trespass on the land.⁴⁷ Although the gist of an action for trespass is a violation of possession, and not a challenge to the title,⁴⁸ a defendant in a trespass action may dispute a plaintiff's possessory right by showing title and the possessory right in himself.⁴⁹

A plea of title in a third person may not be set up by a defendant who is not

42. 58 Am Jur 2d, Nuisances § 433.

43. Restatement, Torts 2d § 202.

■■■■ *Definition:* The term "trespass-nuisance" has been utilized to refer to conduct as to which a defense of governmental immunity does not apply, and has been defined as a trespass or an interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government of its agents and results in personal or property damage. *Hadfield v Oakland County Drain Comr.*, 430 Mich 139, 422 NW2d 205.

44. Restatement, Torts 2d § 264(1).

45. *Williams v State*, 181 Ga App 902, 354 SE2d 184, cert den and app dismd 484 US 803, 98 L Ed 2d 12, 108 S Ct 47, reh den 484 US 972, 98 L Ed 2d 412, 108 S Ct 474.

As to privilege to trespass onto adjoining land to avoid an obstruction, see § 101.

For discussion of liability for removal or destruction of and injuries to fences, generally, see 35 Am Jur 2d, Fences §§ 33-36.

Forms: Complaint, petition, or declaration—Allegation—Removal of fence. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 21.

46. *Stillwell v Duncan*, 103 Ky 59, 44 SW 357; *Lambert v Rainbolt*, 207 Okla 451, 250 P2d 459; *Thomsen v State*, 70 Wash 2d 92, 422 P2d 824.

For a discussion of title by adverse possession as a defense to an action of trespass, see 3 Am Jur 2d, Adverse Possession §§ 297, 300, 301.

47. Restatement, Torts 2d § 185.

48. § 3.

49. *Jaycox v E.M. Harris Bldg. Co. (Mo App)* 754 SW2d 931.

in privity of title with such third person.⁵⁰ Similarly, since, as against one in possession, an intruder must justify his invasion by virtue of his own title, and not by the weakness of the plaintiff's title, the fact that the plaintiff's title was defective is not a defense to liability in trespass.⁵¹

C. NECESSITY [§§ 94-102]

(1) JUSTIFICATION FOR TRESPASS [§§ 94-97]

§ 94. Generally

The defense of necessity is, in trespass as in other tort cases,⁵² based on the social policy which recognizes that individuals should at times be free from restraints in order to avoid certain imminent harms.⁵³ The defense of necessity, public or private, will justify or excuse an act of trespass,⁵⁴ although, where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege.⁵⁵

Under the law of torts, one is privileged to enter and remain on land in the possession of another if such entry is, or reasonably appears to be, necessary to prevent serious harm to the actor, his land, or chattels, or to the other or a third person, or to the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he should take such an action.⁵⁶ One is similarly privileged to enter land if the actor reasonably believes it is necessary for the purpose of averting an imminent public disaster.⁵⁷ Substantially the same rules apply with respect to trespass to chattels.⁵⁸

§ 95. Applicability in criminal cases

In an appropriate factual situation, the common law defense of necessity may be interposed to a criminal trespass action.⁵⁹ However, the defense does

50. Northern P.R. Co. v Lewis, 162 US 366, 40 L Ed 1002, 16 S Ct 831; Vidmer v Lloyd, 193 Ala 386, 69 So 480; Thomsen v State, 70 Wash 2d 92, 422 P2d 824.

As to the plea or answer in a trespass action, generally, see § 211.

51. Beardslee v New Berlin Light & Power Co., 207 NY 34, 100 NE 434; Thomsen v State, 70 Wash 2d 92, 422 P2d 824.

A trespasser without color of title cannot defeat an action for trespass upon the ground that the plaintiff was claiming under an invalid patent. Carson v Turk, 146 Ky 733, 143 SW 393.

52. 74 Am Jur 2d, Torts § 45.

53. State v O'Brien (Mo App) 784 SW2d 187; Buckley v Falls Church, 7 Va App 32, 371 SE2d 827.

At common law, the defense of necessity has been recognized under certain narrowly defined circumstances, and rests upon the proposition that there may be circumstances where the value protected by the law is, as a matter of

public policy, eclipsed by a superseding value, making application of the criminal rule inappropriate and unjust. State v Drummy, 18 Conn App 303, 557 A2d 574.

For discussion of the defense of necessity, or justification, in a criminal prosecution, generally, see 21 Am Jur 2d, Criminal Law § 147.

54. Surocco v Geary, 3 Cal 69; Proctor v Adams, 113 Mass 376; Ploof v Putnam, 81 Vt 471, 71 A 188.

55. Restatement, Torts 2d § 197(2).

56. Restatement, Torts 2d § 197(1).

57. Restatement, Torts 2d § 196.

58. Restatement, Torts 2d §§ 262, 263.

59. People v Hubbard, 115 Mich App 73, 320 NW2d 294 (disagreed with on other grounds by People v Thomas, 115 Mich App 586, 321 NW2d 742) as stated in People v Taormina, 130 Mich App 73, 343 NW2d 236 (nuclear power protest).

For discussion of the defense of necessity in a criminal prosecution, generally, see 21 Am Jur 2d, Criminal Law § 147.

not arise from the choice of several courses of action; it is based on a real emergency and can only be asserted by a defendant who is confronted with such a crisis as a personal danger, a crisis which did not permit a selection from among several solutions, some of which involve criminal acts.⁶⁰ If there is a reasonable, legal alternative to committing the trespass, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense of necessity is not available.⁶¹

■■■■ Observation: An alleged violation of international law is not, as necessary to prevent the commission of a war crime or a crime against humanity, a defense to a violation of a state criminal trespass statute, as necessary to prevent the commission of a war crime or a crime against humanity, since international law is not paramount to and does not in any way supersede state criminal law.⁶²

§ 96. "Choice of evils" and "competing harms"

The defense of necessity traditionally addresses the dilemma created when physical forces beyond the actor's control render illegal conduct the lesser of two evils.⁶³

Conduct which the actor believes to be necessary to avoid imminent physical harm to himself or another, that is, the necessity of choosing trespass as the lesser of two evils or two competing harms, is justifiable if the desirability and urgency of avoiding such harm outweigh, according to an understanding of reasonableness, the harm sought to be prevented by the statute defining the crime charged.⁶⁴ Conduct which would otherwise be a crime is, under unusual and imminent circumstances, the lesser of two evils and no offense; when the pressure of circumstances presents one with a choice of evils, the law prefers that a person avoid the greater evil by bringing about the lesser evil.⁶⁵ The

60. *State v Champa* (RI) 494 A2d 102 (necessity is not a defense to charges arising from a typical protest).

The necessity defense applies only where an emergency produces the necessity. *Cleveland v Anchorage* (Alaska) 631 P2d 1073.

A choice of evils defense is not available to a defendant being prosecuted for criminal trespass, for having unlawfully entered and remained on the premises of a doctor who conducted abortions, without proof of extraordinary attendant circumstances requiring emergency measures. *Pursley v State*, 21 Ark App 107, 730 SW2d 250.

Annotations: Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 ALR4th 773.

61. *Buckley v Falls Church*, 7 Va App 32, 371 SE2d 827.

As to elements of the defense of necessity in actions for trespass, see § 98.

62. *Yoos v State* (Fla App D5) 522 So 2d 898, 13 FLW 514.

63. *Buckley v Falls Church*, 7 Va App 32, 371 SE2d 827.

Annotations: Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 ALR4th 773.

64. *State v Dansinger* (Me) 521 A2d 685 (stating that the desirability and urgency of such conduct may not rest upon considerations pertaining to the morality and advisability of such statute).

65. *State v Drummy*, 18 Conn App 303, 557 A2d 574; *State v O'Brien* (Mo App) 784 SW2d 187.

A choice of evils defense is not available to a defendant being prosecuted for criminal trespass, for having unlawfully entered and remained on the premises of a doctor who conducted abortions, without proof of extraordinary attendant circumstances requiring emergency measures in order to avoid an imminent public or private injury and where there was no proof of any imminent danger of injury to the women the defendant followed onto the doctor's private property for the purpose of expressing his views. *Pursley v State*, 21 Ark App 107, 730 SW2d 250.

“competing harms” defense exonerates one who commits a crime under the pressure of circumstances if the harm that would have resulted from compliance with the law exceeds the harm actually resulting from the defendants’ violation of the law.⁶⁶

The competing harms defense does not exonerate defendants charged with trespassing, where the defendants had legal alternatives, where there was no imminent harm, and most importantly, where no reasonable person could find there was a direct causal relationship between the defendants’ actions in the avoidance of the alleged harm, since under any possible set of hypothesis, defendants could foresee that their actions would fail to halt the corporation’s production of the war material.⁶⁷

|||| Distinction: Where a statute proscribes the conduct allegedly constituting the trespass in terms of strict or absolute liability, such as trespassing on a nuclear power plant construction site, the defense of justification is not available.⁶⁸

§ 97. Practice guide: Motion in limine

Many courts have determined that the defenses of necessity, justification, or competing harms are not available to defendants charged with trespass in public demonstration cases.⁶⁹ Counsel may wish to use a motion in limine to gain an early ruling on the use of such defenses in a prosecution based on unauthorized entry on business, industrial, or utility premises.⁷⁰

|||| Caution: Although a trial judge may properly rule, at a pretrial hearing on motions in limine, that the competing harms defense is unavailable because there is no evidence to warrant a reasonable doubt whether the trespass was justified by necessity, such a ruling may prevent even the introduction of evidence in support of the defense, and it is deemed more prudent for the judge to follow the traditional and constitutionally sounder course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense.⁷¹

(2) ELEMENTS [§ 98]

§ 98. Generally

Under the common law, the defense of necessity must be one of absolute and uncontrollable necessity, and this must be established beyond a reason-

66. *State v Dansinger* (Me) 521 A2d 685 (by implication); *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188.

67. *State v Marley*, 54 Hawaii 450, 509 P2d 1095 (trespass allegedly to protest a corporation’s role in manufacturing weapons).

68. *State v Hunt* (Mo App) 630 SW2d 211.

As to trespass on nuclear power, or atomic energy, installations, see 6 Am Jur 2d, Atomic Energy § 37.

69. § 100.

70. *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188; *St. Louis v Klocker* (Mo App) 637 SW2d 174.

Annotations: Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 ALR4th 773 § 2[b].

71. *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188.

For discussion of motions in limine in civil and criminal actions, generally, see 75 Am Jur 2d, Trial §§ 91 et seq.

Annotations: Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311.

able doubt.⁷² Anything less than an uncontrollable necessity, which admits of no compromise and cannot be resisted, will not justify the offense.⁷³

In a case of criminal trespass, in order for the defense of necessity to apply, the defendants must have no other legal or lawful alternative;⁷⁴ the harm threatened must be imminent;⁷⁵ the act charged must have been done to

72. *State v O'Brien* (Mo App) 784 SW2d 187 (abortion protest).

As to particular circumstances in which a tort is justified by necessity, see 74 Am Jur 2d, Torts § 47.

73. *State v O'Brien* (Mo App) 784 SW2d 187 (any rule less stringent than such would open the door to all sorts of fraud).

74. *Northeast Women's Center, Inc. v McMonagle* (CA3 Pa) 868 F2d 1342, cert den (US) 107 L Ed 2d 210, 110 S Ct 261 (abortion protest); *Cleveland v Anchorage* (Alaska) 631 P2d 1073 (abortion protest); *State v Drummy*, 18 Conn App 303, 557 A2d 574 (recognizing rule); *State v Marley*, 54 Hawaii 450, 509 P2d 1095 (abortion protest); *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188 (nuclear weapons protest); *State v O'Brien* (Mo App) 784 SW2d 187 (abortion protest); *State v Diener* (Mo App) 706 SW2d 582 (nuclear weapons protest); *St. Louis v Klockner* (Mo App) 637 SW2d 174 (abortion protest); *Commonwealth v Wall*, 372 Pa Super 534, 539 A2d 1325, app den 521 Pa 604, 555 A2d 114 (abortion protest); *State v Champa* (RI) 494 A2d 102 (nuclear arms protest); *Buckley v Falls Church*, 7 Va App 32, 371 SE2d 827.

An illegal trespass, on a defense contractor's property to offer leaflets to entering employees designed to influence public policies, could not be considered "necessary" for purposes of necessity defense where lawful avenues were available. In *re Weller* (1st Dist) 164 Cal App 3d 44, 210 Cal Rptr 130 (nuclear weapons protest).

Protestors against nuclear arms arrested for criminal trespass on the grounds of a nuclear power research laboratory, could not avail themselves of the defense of competing harms, asserting that the harm caused by their trespass was outweighed by the harm they acted to prevent, namely, the nuclear arms race, where other avenues were available to the defendants to abate the danger, including use of the publicity media, distribution of literature at an appropriate site, and participation in the political process. *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188; *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188 (nuclear weapons protest).

As to criminal liability for trespass, see §§ 162 et seq.

For discussion of the defense of necessity in

a criminal prosecution, generally, see 21 Am Jur 2d, Criminal Law § 147.

75. *Northeast Women's Center, Inc. v McMonagle* (CA3 Pa) 868 F2d 1342, cert den (US) 107 L Ed 2d 210, 110 S Ct 261 (abortion protest); *Pursley v State*, 21 Ark App 107, 730 SW2d 250; *State v Drummy*, 18 Conn App 303, 557 A2d 574 (recognizing rule); *State v Marley*, 54 Hawaii 450, 509 P2d 1095 (abortion protest); *State v Dansinger* (Me) 521 A2d 685 (nuclear weapons protest); *Sigma Reproductive Health Center v State*, 297 Md 660, 467 A2d 483 (recognizing rule); *People v Hubbard*, 115 Mich App 73, 320 NW2d 294 (disagreed with on other grounds by *People v Thomas*, 115 Mich App 586, 321 NW2d 742) as stated in *People v Taormina*, 130 Mich App 73, 343 NW2d 236 (nuclear power protest); *State v O'Brien* (Mo App) 784 SW2d 187 (abortion protest); *State v Diener* (Mo App) 706 SW2d 582 (nuclear weapons protest); *Commonwealth v Capitolo*, 508 Pa 372, 498 A2d 806 (nuclear power protest); *Commonwealth v Wall*, 372 Pa Super 534, 539 A2d 1325, app den 521 Pa 604, 555 A2d 114 (abortion protest); *State v Champa* (RI) 494 A2d 102; *Erlandson v State* (Tex App Houston (14th Dist)) 763 SW2d 845, petition for discretionary review ref (Apr 26, 1989) and motion for rehearing on PDR denied (May 24, 1989) and motion for rehearing on PDR denied (Jun 7, 1989) and cert den (US) 107 L Ed 2d 110, 110 S Ct 152 (abortion protest); *Buffalo Marine Service, Inc. v Monteau* (Tex App Houston (14th Dist)) 761 SW2d 416 (seeking shelter from hurricane); *Schermbeck v State* (Tex App Dallas) 690 SW2d 315 (nuclear power protest); *State v Warshow*, 138 Vt 22, 410 A2d 1000 (nuclear power protest); *Buckley v Falls Church*, 7 Va App 32, 371 SE2d 827.

The competing harms justification was not available to nuclear arms protesters, arrested for criminal trespass on state national guard property, who contended that their trespass was justified because aircraft stationed at the base had the capacity to refuel aircraft carrying nuclear arms, and that such constituted a set of conditions that presented imminent physical harm contemplated by the statute, where the statutory defense clearly excluded acts of civil disobedience and where nuclear war was not imminent within the meaning of the statute, that is, appearing as if about to happen. *State v Dansinger* (Me) 521 A2d 685.

Low level radiation and nuclear waste are not the types of imminent danger classified as an

prevent a clear and readily apparent,⁷⁶ significant harm;⁷⁷ the actions of the alleged trespassers must be reasonably designed to actually prevent the threatened harm,⁷⁸ or provide a reasonable expectation of success in avoiding the harm,⁷⁹ such that a direct causal relationship may be reasonably anticipated to exist between the defendant's action and the avoidance of the harm;⁸⁰ and the harm caused must not have been disproportionate to the harm caused by the trespass.⁸¹ Further, the legislature must not have acted to preclude the defense by a clear and deliberate choice regarding the values at issue.⁸²

(3) HARMS ENCOMPASSED [§§ 99–102]

§ 99. Generally

The defense of necessity deals with obvious and generally recognized harms, not with those which are debatable and the subject of legislation or govern-

emergency sufficient to justify criminal trespass. *State v Warshow*, 138 Vt 22, 410 A2d 1000 (nuclear power protest).

76. *Commonwealth v Wall*, 372 Pa Super 534, 539 A2d 1325, app den 521 Pa 604, 555 A2d 114 (abortion protest).

77. *State v O'Brien* (Mo App) 784 SW2d 187 (abortion protest); *State v Diener* (Mo App) 706 SW2d 582 (nuclear weapons protest); *St. Louis v Klocker* (Mo App) 637 SW2d 174 (abortion protest).

78. *Cleveland v Anchorage* (Alaska) 631 P2d 1073 (by implication); *State v Marley*, 54 Hawaii 450, 509 P2d 1095; *Sigma Reproductive Health Center v State*, 297 Md 660, 467 A2d 483 (recognizing rule); *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188 (nuclear weapons protest); *Commonwealth v Averill*, 12 Mass App 260, 423 NE2d 6 (nuclear power protest); *Commonwealth v Wall*, 372 Pa Super 534, 539 A2d 1325, app den 521 Pa 604, 555 A2d 114 (abortion protest).

The defense of necessity was not available to defendants, convicted of trespass for breaking into a boatyard of defense contractor and spray-painting "thou shalt not kill" on missile tubes of nuclear submarines; since other legal means of protest were available, there was no basis for finding that an imminent threat justified violation of law, and the act of spray painting could not have been reasonably calculated to bring about actual halt of production of missile components. *State v Champa* (RI) 494 A2d 102 (nuclear arms protest).

79. *Northeast Women's Center, Inc. v McMonagle* (CA3 Pa) 868 F2d 1342, cert den (US) 107 L Ed 2d 210, 110 S Ct 261 (abortion protest); *State v Dansinger* (Me) 521 A2d 685 (nuclear weapons protest); *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188 (nuclear

weapons protest); *State v Diener* (Mo App) 706 SW2d 582 (nuclear weapons protest).

80. *State v Drummy*, 18 Conn App 303, 557 A2d 574 (recognizing rule); *State v Marley*, 54 Hawaii 450, 509 P2d 1095 (abortion protest); *Commonwealth v Averill*, 12 Mass App 260, 423 NE2d 6 (nuclear power protest); *State v Champa* (RI) 494 A2d 102; *Buckley v Falls Church*, 7 Va App 32, 371 SE2d 827.

81. *St. Louis v Klocker* (Mo App) 637 SW2d 174 (abortion protest); *Erlandson v State* (Tex App Houston (14th Dist)) 763 SW2d 845, petition for discretionary review ref (Apr 26, 1989) and motion for rehearing on PDR denied (May 24, 1989) and motion for rehearing on PDR denied (Jun 7, 1989) and cert den (US) 107 L Ed 2d 110, 110 S Ct 152 (abortion protest); *Bobo v State* (Tex App Houston (14th Dist)) 757 SW2d 58, petition for discretionary review ref (Dec 21, 1988) and motion for rehearing on PDR denied (Jan 18, 1989) and cert den 490 US 1066, 104 L Ed 2d 631, 109 S Ct 2066 (abortion protest).

82. *Northeast Women's Center, Inc. v McMonagle* (CA3 Pa) 868 F2d 1342, cert den (US) 107 L Ed 2d 210, 110 S Ct 261, later proceeding (CA3 Pa) 889 F2d 466, cert den (US) 108 L Ed 2d 790, 110 S Ct 1788, later proceeding (ED Pa) 745 F Supp 1082, motion den (ED Pa) 1990 US Dist LEXIS 12861 and motion gr (ED Pa) 1990 US Dist LEXIS 13257, later proceeding (ED Pa) 1990 US Dist LEXIS 16265 and mod (ED Pa) 749 F Supp 695, later proceeding (ED Pa) 755 F Supp 135 and reh den (US) 108 L Ed 2d 651, 110 S Ct 1515 (abortion protest); *State v O'Brien* (Mo App) 784 SW2d 187 (abortion protest); *Erlandson v State* (Tex App Houston (14th Dist)) 763 SW2d 845, petition for discretionary review ref (Apr 26, 1989) and motion for rehearing on PDR denied (May 24, 1989) and motion for rehearing on PDR denied (Jun 7, 1989) and cert den (US) 107 L Ed 2d 110, 110 S Ct 152 (abortion protest).

ment regulation.⁸³ The defense is meant to justify action that society would clearly want to exonerate and, thus, when a court applies the necessity test, the balancing of the harms reflects society's consensus.⁸⁴ Where the alleged harm is not a legally recognizable injury, the defense is not applicable.⁸⁵

Although the defense of necessity traditionally addresses the dilemma created when physical forces beyond the actor's control render a trespass the lesser of two evils,⁸⁶ the requirement that the harm sought to be avoided by necessity arise either from physical forces of nature or from unlawful human acts has been relaxed such that the defense of necessity may encompass harm caused by human beings, if such expansion is limited to those human threats which are illegal.⁸⁷

In order to raise the defense of necessity in defense to trespass, the harm caused must not have been disproportionate to the harm caused by the trespass.⁸⁸ For instance, where a statutory defense of necessity is available only where the accused was without blame in occasioning or developing a situation and reasonably believed the conduct was necessary to avoid a public or private injury, greater than the injury which might reasonably result from the trespass, the doctrine of necessity is not available in defense to a trespass for protest that interferes with constitutional rights.⁸⁹

■■■■ Observation: It has been suggested in the context of criminal trespass that where the prevented harm emanates from a human source, the harm must be unlawful and that the defense of necessity is not available if the human act is legal; however, the courts have not fully articulated the availability of the defense in the dichotomy of the legal-illegal distinction, inasmuch as legality is not the only test and, thus, it may be that in certain limited situations, the defense may be available when the human activity is legal.⁹⁰

§ 100. Protest of political or moral issue

The defense of necessity is not a valid defense for criminal trespass charges which stem from political or moral protest, in view of the availability of

83. *State v Drummy*, 18 Conn App 303, 557 A2d 574; *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188 (nuclear weapons protest); *Commonwealth v Averill*, 12 Mass App 260, 423 NE2d 6 (nuclear power protest); *Erlandson v State* (Tex App Houston (14th Dist)) 763 SW2d 845, petition for discretionary review ref (Apr 26, 1989) and motion for rehearing on PDR denied (May 24, 1989) and motion for rehearing on PDR denied (Jun 7, 1989) and cert den (US) 107 L Ed 2d 110, 110 S Ct 152 (by implication) (abortion protest).

84. *People v Smith* (3d Dist) 161 Ill App 3d 213, 112 Ill Dec 745, 514 NE2d 211, app den (Ill) 117 Ill Dec 230, 520 NE2d 391.

85. *Cleveland v Anchorage* (Alaska) 631 P2d 1073 (by implication); *People v Stiso* (1st Dist) 93 Ill App 3d 101, 48 Ill Dec 687, 416 NE2d 1209; *People v Krizka* (1st Dist) 92 Ill App 3d 288, 48 Ill Dec 141, 416 NE2d 36; *Sigma Reproductive Health Center v State*, 297 Md

660, 467 A2d 483 (recognizing rule); *Commonwealth v Averill*, 12 Mass App 260, 423 NE2d 6 (by implication).

86. § 96.

87. *Bird v Anchorage* (Alaska App) 787 P2d 119 (abortion protest); *State v O'Brien* (Mo App) 784 SW2d 187 (abortion protest); *St. Louis v Klocker* (Mo App) 637 SW2d 174 (abortion protest).

88. § 98.

89. *People v Smith* (3d Dist) 161 Ill App 3d 213, 112 Ill Dec 745, 514 NE2d 211, app den (Ill) 117 Ill Dec 230, 520 NE2d 391 (abortion protest).

As to trespass for political and moral protest, generally, as justified by necessity, see § 100.

For discussion of criminal trespass statutes, generally, and their effect on First Amendment rights, see § 170.

90. *State v O'Brien* (Mo App) 784 SW2d 187.

alternative, noncriminal means of accomplishing a a protestor's purpose⁹¹ and the disproportionate harm which may result where the trespass interferes with another's constitutional rights.⁹² Thus, the defense is unavailable against a charge of criminal trespass based on a protest, where there has been exhaustive legislative debate and legislation on the issue which the defendants protested by means of trespass.⁹³

■■■■ Observation: Illegal conduct designed to influence policies as a means of accomplishing political change cannot be considered necessary where lawful avenues such as the ballot box or, where appropriate, court action are available.⁹⁴

Trespasses that interfere with constitutional rights are not justified as actions that society would clearly want to exonerate.⁹⁵ For example, where abortions are a legal, constitutionally protected activity, their occurrence cannot be a legally recognizable public or private injury;⁹⁶ thus, the necessity defense is not available to those who break the law in an effort to prevent abortions.⁹⁷

91. *Buckley v Falls Church*, 7 Va App 32, 371 SE2d 827.

As to the requirement that the actor have no other legal alternative to the trespass, see § 98.

Annotations: Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 ALR4th 773.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 ALR3d 551.

92. § 99.

93. *People v Hubbard*, 115 Mich App 73, 320 NW2d 294 (disagreed with on other grounds by *People v Thomas*, 115 Mich App 586, 321 NW2d 742) as stated in *People v Taormina*, 130 Mich App 73, 343 NW2d 236 (nuclear power protest).

The defendant, in a prosecution for criminal trespass after forcing his way into an abortion clinic on a "rescue mission," to hinder or stop the performance of abortions, was not entitled to the defense of justification where he was unable to demonstrate that the legislature had not acted to preclude the defense by clear and deliberate choice with respect to abortion. *Commonwealth v Wall*, 372 Pa Super 534, 539 A2d 1325, app den 521 Pa 604, 555 A2d 114.

94. *In re Weller* (1st Dist) 164 Cal App 3d 44, 210 Cal Rptr 130.

As to the requirement, in defense of criminal trespass, that there be no other legal alternative to the trespass, see § 95.

95. *People v Smith* (3d Dist) 161 Ill App 3d 213, 112 Ill Dec 745, 514 NE2d 211, app den

(Ill) 117 Ill Dec 230, 520 NE2d 391 (abortion protest).

96. *State v O'Brien* (Mo App) 784 SW2d 187; *St. Louis v Klocker* (Mo App) 637 SW2d 174.

97. *Cleveland v Anchorage* (Alaska) 631 P2d 1073; *Bird v Anchorage* (Alaska App) 787 P2d 119.

In view of legislative action that no interference with a woman's choice to have an abortion is to be tolerated, the defense of choice of evils was not available to a defendant in the criminal trespass action for blocking entry to women to an abortion clinic. *State v Clowes*, 100 Or App 266, 785 P2d 1071, review gr 309 Or 698, 790 P2d 1141 and review gr 309 Or 698, 790 P2d 1141 and affd 310 Or 686, 801 P2d 789.

Anti-abortion activists, convicted for criminal trespass on the grounds of an abortion clinic, could not avail themselves of the defense of necessity where the clinic was a facility licensed by the state to perform abortions and where the clinic's staff and patrons were acting within constitutionally recognized principals which permit abortion. *Erlandson v State* (Tex App Houston (14th Dist)) 763 SW2d 845, petition for discretionary review ref (Apr 26, 1989) and motion for rehearing on PDR denied (May 24, 1989) and motion for rehearing on PDR denied (Jun 7, 1989) and cert den (US) 107 L Ed 2d 110, 110 S Ct 152.

Law Reviews: S. Russell, Status of the Texas necessity defense in abortion clinic trespass cases assuming the demise of *Roe v Wade* [93 S. Ct. 705], 17 Am J Crom L 1-17 (Fall 1989).

The necessity defense in abortion clinic trespass cases, 32 St. Louis ULJ 523-47 (Winter 1987).

§ 101. Avoidance of obstacle, obstruction, or injury

Great inconvenience, in instances not involving the destruction of property, has on occasion been regarded as the equivalent of necessity in defense to an action for trespass.⁹⁸

Practice guide: A traveler on a public highway who reasonably believes that such highway is impassable, is privileged, when he reasonably believes it to be necessary in order to continue his journey, to enter, to a reasonable extent and on a reasonable manner, upon the neighboring land in the possession of another, unless the condition of the highway has been caused by the tortious conduct of the traveler, or he has had a reasonable opportunity to avoid its use.⁹⁹

A person is justified in trespassing upon the property of another where—

—A public highway becomes obstructed and impassable from temporary causes forcing a traveler to go upon the adjoining land.¹

—An easement has become impassable because of the act of the owner of the servient tenement in placing obstructions thereon, forcing the owner to pass over the adjoining land as far as is necessary to avoid the obstruction.²

—A person enters on adjacent premises for the purpose of shoring up an adjoining building, to prevent its injuring his property, in the absence of a statutory provision requiring the license of the landowner.³

§ 102. Preservation of life or property

The doctrine of necessity applies with special force to the preservation of human life.⁴

Illustration: To escape the fury of a sudden storm, one is justified in mooring a sloop to another's dock in order to preserve the lives and property on board.⁵

A trespass upon the property of another is justified by necessity where a person enters upon the premises of another in order to rescue those endangered by fire⁶ or to lay a fire hose across another's property in order to

98. *Hetfield v Baum*, 35 NC 394 (recovering cargo strewn over another's land).

As to the privilege of a traveler on a public highway to remove an obstruction which interferes with his present use of the highway, see § 92.

Annotations: Easements: way by necessity where property is accessible by navigable water, 9 ALR3d 600.

Forms: Answer—Defense—Necessity—Impassable highway. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 52.

99. Restatement, Torts 2d § 195.

1. 39 Am Jur 2d, Highways, Streets, and Bridges § 197.

2. 25 Am Jur 2d, Easements and Licenses § 70.

3. 1 Am Jur 2d, Adjoining Landowners § 8.

4. *State v Hoyt*, 21 Wis 2d 284, 128 NW2d 645.

5. *Ploof v Putnam*, 81 Vt 471, 71 A 188.

A plaintiff, who at the threat of an imminent hurricane tied his boat to a barge docked at a marina, in seeking safe harbor, in a channel in which many other boats were already being secured, was not a trespasser where it was the common and accepted practice for boat owners to take their boats to safer mooring in the face of a severe storm. *Buffalo Marine Service, Inc. v Monteau* (Tex App Houston (14th Dist)) 761 SW2d 416.

6. *State v Hoyt*, 21 Wis 2d 284, 128 NW2d 645.

extinguish a fire,⁷ and where a person destroys a building on the property of another to prevent the spread of a fire.⁸ However, the individual destroying the building must be regulated by judgment and actual or apparent necessity.⁹ The right to destroy private property for the protection of life, liberty, or property can be exercised only in cases of extreme, imperative, or overruling necessity.¹⁰ Mere impending danger furnishes no justification for such an extreme measure.¹¹ If an individual trespasses without actual or apparent danger, he is liable in trespass.¹²

d. AUTHORITY OF LAW [§§ 103-105]

§ 103. Generally; law enforcement officers

A duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority, in so far as the entry is reasonably necessary to such performance or exercise, only if all the requirements of the enactment are fulfilled.¹³

■■■■ Observation: Trespass will lie for an entry upon the real property of another when the statute authorizing the entry is unconstitutional.¹⁴

Conduct otherwise a trespass is often justifiable by reason of authority vested in the person who does the act,¹⁵ as, for example, an officer of the law acting in the performance of his duty.¹⁶ Thus, a law enforcement officer is

7. *Metallic Compression Casting Co. v Fitchburg R. Co.*, 109 Mass 277 (hose laid across railroad tracks).

8. *Bowditch v Boston*, 101 US 16, 25 L Ed 980; *Surocco v Geary*, 3 Cal 69; *American Print Works v Lawrence*, 23 NJL 590.

9. *Bowditch v Boston*, 101 US 16, 25 L Ed 980; *Surocco v Geary*, 3 Cal 69; *American Print Works v Lawrence*, 23 NJL 590.

10. *Hale v Lawrence*, 21 NJL 714, later app 23 NJL 590.

Forms: Answer—Defense—Acts by defendant to preserve property. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 56.

11. *Richmond v Smith*, 82 US 429, 21 L Ed 200.

12. *Surocco v Geary*, 3 Cal 69.

13. Restatement, Torts 2d § 211.

14. *Paine v Savage*, 126 Me 121, 136 A 664, 51 ALR 1194.

A police officer committed a trespass in violation of the state constitution by going on the property for the purpose of obtaining evidence of a criminal law violation, by accompanying a utility company employee who had permission to be on the property to read the meters, since the officer's act was outside the scope of the implied permission for a meter reader to come onto the property. *State v Donahue*, 93 Or App

341, 762 P2d 1022, review den 307 Or 303, 767 P2d 443.

As to the rule that an unconstitutional statute does not justify any act performed under it, see 16 Am Jur 2d, Constitutional Law § 256.

15. *Brown v Beatty*, 34 Miss 227; *Montgomery v Reorganized School Dist. (Mo)* 339 SW2d 831, 90 ALR2d 1201.

Restatement, Torts 2d §§ 204-211.

16. *Downs v United States* (CA6 Tenn) 522 F2d 990, 36 ALR Fed 219; *Foster v United States* (CA5 Fla) 296 F2d 65; *Giacona v United States* (CA5 Tex) 257 F2d 450, cert den 358 US 873, 3 L Ed 2d 104, 79 S Ct 113; *State v Halko (Super)* 55 Del 385, 188 A2d 100.

In actions for trespass and conversion by a corporate owner and individual operators of a cigarette retail establishment seeking damages allegedly arising from the tortious conduct of agents of the State Department of Taxation and Finance, the actions were dismissed where, although in the course of a routine inspection the agents conducted a warrantless search of the premises, seized cigarettes, cash, a revolver and ammunition, a statute authorized the Tax Commission to examine all books, records, equipment and stock of cigarettes of any premises where cigarettes were being sold or stored, legally or illegally, and the agents were acting within their power. *Mubarez v New York*, 115 Misc 2d 57, 453 NYS2d 549.

privileged to commit a trespass if he is exercising his lawful authority and if he exercises it in a reasonable manner causing no unnecessary harm.¹⁷

■■■■ *Practice guide:* An officer of the law is privileged to make an entry to—

- Arrest for a criminal offense;¹⁸
- Recapture or prevent a crime and in related situations;¹⁹
- Assist in making an arrest or other apprehension;²⁰

■■■■ *Illustration:* In an action brought by the owner of a hijacked airplane against the government for damage caused to the plane when a federal agent used rifle fire to disable one of its engines and to attempt to deflate its tires, the agent's trespass was wrongful and was not shielded by privilege where the court had found that the agent's decision to disable the plane was unreasonable.²¹

A party cannot be liable for trespass if acting pursuant to and within the scope of a valid court order.²²

§ 104. —Other persons with privilege of authority

Actions of persons other than officers of the law may be justified by reason of authority vested in such persons as, for instance—

- Union agents, engaged in a lawful union activity, may not be subjected to criminal liability for protecting workers against the dangers of a workplace, despite a construction site owner's request to leave the premises.²³
- State agencies in authorizing beach front parking blocking property owned by several motel owners, pursuant to a valid legislative rule;²⁴
- Soldiers in the exercise of belligerent rights.²⁵
- Firemen entering a premises to investigate reports of a fire or to actually fight a fire.²⁶
- Surveyors acting under authority in making alterations in a highway.²⁷

As to trespass ab initio, generally, and liability of officers for acting in excess of authority, see §§ 61 et seq.

For discussion of the liability of a public officer for acts committed in the line of duty and in excess of authority, see 63A Am Jur 2d, Public Officers and Employees §§ 372, 373.

17. *Downs v United States* (CA6 Tenn) 522 F2d 990, 36 ALR Fed 219.

18. Restatement, Torts 2d § 204.

19. Restatement, Torts 2d §§ 205, 206.

20. Restatement, Torts 2d § 207.

21. *Downs v United States* (CA6 Tenn) 522 F2d 990, 36 ALR Fed 219.

22. *Skierkewicz v Gonzalez* (ND Ill) 711 F Supp 931, later proceeding (ND Ill) 1989 US Dist LEXIS 9035.

Restatement, Torts 2d § 210.

23. *Re Catalano*, 29 Cal 3d 1, 171 Cal Rptr 667, 623 P2d 228, 106 BNA LRRM 2565, 94 CCH LC ¶ 55340.

24. *Hay v Oregon Dept. of Transp.*, 301 Or 129, 719 P2d 860.

Forms: Complaint, petition, or declaration—Allegation—Unauthorized use of land—For parking area. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 26.

25. 54 Am Jur 2d, Military, and Civil Defense §§ 291-294.

26. *State v Howard*, 184 Neb 274, 167 NW2d 80.

Restatement, Torts 2d § 196.

27. *Munson v Mallory*, 36 Conn 165.

Annotations: Eminent domain: right to enter land for preliminary survey or examination, 29 ALR3d 1104.

- Private persons seizing property for a forfeiture to the government.²⁸
- Power companies running electric transmission lines.²⁹
- Telephone companies erecting poles³⁰ or trimming trees under the authority of a public official.³¹

§ 105. Effect of mistaken belief in authority

Although, generally, neither a mistake of law or fact nor the absence of bad faith on the part of the defendant will excuse a trespass, at common law,³² an honest and reasonable belief in the existence of circumstances which, if true, would have made the trespass innocent, is a good defense.³³ Thus, an act which, as related to the true owner of land, might appear to be a trespass is not in fact a trespass if the act is committed in good faith by one who actually and sincerely believes that he is authorized to do the act in question.³⁴

A bona fide claim of right is a sincere, although perhaps mistaken, good faith belief that one has some legal right to be on the property; the claim need not one of title or ownership, but it must rise to the level of authorization.³⁵

■■■■ Observation: Where a trespass statute awards single damages where the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own, or that of a person in whose service or by whose direction the act was done, probable cause means an honest and reasonable belief; a negligent mistake as to authority cannot qualify as probable cause since negligence involves unreasonable conduct.³⁶

Subjective reasons for a defendant to be on the property of another, not related to a claimed property right or permission, are irrelevant and immaterial to the issue of a claim of right.³⁷

28. *Gelston v Hoyt*, 16 US 246, 4 L Ed 381.

As to seizure adopted by the government, see 36 Am Jur 2d, Forfeitures and Penalties § 31.

29. *Brassette v Central Louisiana Electric Co.* (La App 3d Cir) 383 So 2d 120.

Restatement, Torts 2d § 191.

30. In *Brammer v Iowa Tel. Co.*, 182 Iowa 865, 165 NW 117, 1 ALR 400 (it is competent for the legislature to delegate to the highway engineer the function of determining where telephone lines should be located).

31. *Southern Bell Tel. & Tel. Co. v Francis*, 109 Ala 224, 19 So 1.

Annotations: Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 ALR2d 866.

32. § 74.

33. *Warfield v State*, 315 Md 474, 554 A2d 1238.

34. *Bowman v State*, 258 Ga 829, 376 SE2d 187, on remand 191 Ga App 207, 382 SE2d 434.

License or privilege necessarily involves the state of mind of the defendants, and would provide them with an excuse for criminal trespass only if they believed they were licensed or privileged to trespass onto the property; but, where nuclear arms protestors subsequently arrested for criminal trespass on a national guard air base had previously announced their intention as a peace demonstration to commit a criminal trespass, such defendants admitted they were not authorized to enter the property. *State v Dansinger* (Me) 521 A2d 685.

Forms: Answer—Defense—In mitigation of damages—Defendant's good-faith belief in rightfulness of his acts. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 57.

35. *Reed v Commonwealth*, 6 Va App 65, 366 SE2d 274.

36. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

For discussion of criminal liability for trespass, and criminal intent to trespass, see §§ 162 et seq.

37. *State v Scholberg* (Minn App) 395 NW2d 454.

■■■■ *Practice guide:* In a prosecution for criminal trespass, if the state's evidence shows a defendant has no claim of right to be on the property, the burden of proof shifts to the defendant to show he has a property right such as that of an owner, tenant, lessee, licensee, or invitee.³⁸

■■■■ *Distinction:* Where a defendant, in a prosecution for criminal trespass, establishes a bona fide claim of right as a matter of law because the defendant acted on that good faith belief, he could not have the requisite intent for a criminal trespass conviction; that his belief may have been wrong or immaterial in a civil action does not render his conduct criminal.³⁹

e. REMOVAL OF CHATTEL OR STRUCTURE FROM LAND [§§ 106–109]

§ 106. Generally; removal of chattel by possessor of land

One is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of relieving his own land of a chattel, which has come upon the land otherwise than with his consent or by his tortious conduct or contributory negligence, and to the possession of which the other was entitled at the time it came there.⁴⁰ Thus, the owner of land may remove, where he can do so without a breach of the peace, the personal property of another, placed on the land without a right to do so, after reasonable notice to its owner to remove it.⁴¹ Further, belief in one's right to place a thing on the property of another, no matter how honestly and reasonably entertained, is no justification for preventing the subsequent removal of an offending structure, nor is the great expense of removal, where there has been a deliberate invasion of the possessor's title to real estate.⁴²

■■■■ *Distinction:* The privilege of an actor to enter land in the possession of another for the purpose of relieving his own land of a chattel, which has come upon the land otherwise than with his consent or by his tortious conduct or contributory negligence, is distinct from the privilege of an actor to enter land to remove a chattel in the possession of another because of a prior consent or license by either the possessor or his predecessor in legal interest, in that the privilege to remove a thing tortiously placed on the land does not arise from any transaction between the parties or their predecessors in interest.⁴³

38. *State v Scholberg* (Minn App) 395 NW2d 454.

As to burden of proof in trespass actions, generally, see § 216.

39. *Reed v Commonwealth*, 6 Va App 65, 366 SE2d 274.

As to the effect of mistake of law or fact on the intent to commit the tort of trespass, generally, see § 11.

40. Restatement, Torts 2d § 199(1).

41. *Stillwell v Duncan*, 103 Ky 59, 44 SW 357.

Where a telegraph pole is placed on premises without permission or condemnation, the owner of the premises may remove the pole, after notice to its owner is not acted on within

a reasonable time. *Maryland Tel. & Tel. Co. v Ruth*, 106 Md 644, 68 A 358.

As to the right of a landlord to remove from premises goods of a tenant whose term has expired, see 49 Am Jur 2d, Landlord and Tenant §§ 1014-1016.

42. *Brinkley v Brinkley* (5th Dist) 174 Ill App 3d 705, 124 Ill Dec 353, 529 NE2d 70 (landowners sought a mandatory injunction for the removal of pipeline from their property).

Forms: Complaint, petition, or declaration—Allegation—Removal of fence. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 21.

43. § 106.

§ 107. Requisite degree of care

When a chattel trespasses on land, the landowner is privileged to deal with it in a manner which would otherwise be a trespass, if the act is reasonably necessary to protect the landowner's interest and the harm inflicted is not unreasonable compared to the harm threatened.⁴⁴ Thus, a property owner may remove chattels which are wrongfully on his land, if he uses due care in their removal.⁴⁵ The owner must not inflict wanton or unnecessary injury on the property of another person,⁴⁶ or resort to the exorbitant method of forfeiture.⁴⁷

|||| Observation: One trespass does not excuse another, and one who negligently injures property is liable therefor notwithstanding its being at the place of injury was a trespass.⁴⁸

§ 108. Recaption of chattel distinguished; removal by chattel owner

One is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of removing a chattel to the immediate possession of which the actor is entitled, and which has come upon the land otherwise than with the actor's consent, tortious conduct, or contributory negligence.⁴⁹

|||| Comment: A chattel may come upon the land through the operation of natural forces, by the act of the possessor of the land, or by the act of a third person with the consent of the possessor.⁵⁰

Whenever he may do so peaceably, the owner of a chattel which, without his consent, exclusive negligence, or other default, has been placed upon the land of another may enter and reclaim it without incurring liability in trespass for the taking.⁵¹ A servant, too, may exercise the right of recaption as to his master's property.⁵²

A chattel may also be retaken from the personal possession of one who

44. *Reed v Esplanade Gardens, Inc.*, 91 Misc 2d 991, 398 NYS2d 929, *affd* 93 Misc 2d 71, 403 NYS2d 416 and later proceeding (1st Dept) 111 App Div 2d 85, 489 NYS2d 211.

Restatement, Torts 2d § 199(2).

45. *Rossi v Ventresca Bros. Constr. Co.*, 94 Misc 2d 756, 405 NYS2d 375.

Even if a contractor's heavy equipment was, as the defendant contended, a trespassing chattel, the defendant was only privileged to exercise as much dominion and control over the machine as was necessary to remove it from the defendant's land. *Melbourne Bros. Constr. Co. v Pioneer Co. (W Va)* 384 SE2d 857.

46. *Prince v Case*, 10 Conn 375.

47. *Smith v Furbish*, 68 NH 123, 44 A 398.

48. *Brown v Lynn*, 31 Pa 510.

Louisville & N.R. Co. v Joulilian, 116 Miss 40, 76 So 769, holding a railroad company liable in damages for destroying a vessel driven by a storm onto its right of way, if by the employment of proper help, or by notifying the owner, it could have been removed without

injury before the track could have been restored to use after the injury caused by the storm.

See, however, *Almy v Grinnell*, 53 Mass 53, stating that no duty of ordinary care is imposed upon the possessor in the removal of an unwanted chattel from his property.

49. Restatement, Torts 2d § 198(1).

50. Restatement, Torts 2d § 198, Comment a.

51. *Van Dorn v Couch*, 21 Cal App 2d Supp 749, 64 P2d 1197; *Gaskins v Davis*, 115 NC 85, 20 SE 188.

As to liability for assault and battery for using force in regaining or retaking possession of property, see 6 Am Jur 2d, Assault and Battery § 169.

For discussion of forcible recaption of chattels, see Restatement, Torts 2d §§ 100-111.

Forms: Answer—Defense—Entry to reclaim chattel. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 53.

52. *Sterling v Warden*, 51 NH 217.

As to the liability of master for the trespass

holds it wrongfully, provided that no breach of the peace is committed by its owner in doing so.⁵³ The right of recaption is not affected by the fact that the wrongful possessor of the chattel has annexed it to his property or expended labor upon it so as to increase its value, provided that the identity of the original chattel can still be ascertained.⁵⁴

■■■■ *Observation:* One who is privileged to enter land in the possession of another for the purpose of removing a chattel to the immediate possession of which the actor is entitled,⁵⁵ is subject to liability for any harm done in the exercise of the privilege to any legally protected interest of the possessor of the land or connected with it, except where the chattel is on the land through the tortious conduct or contributory negligence of the possessor.⁵⁶

§ 109. —Necessity of demand by chattel owner

Ordinarily, before the owner of a chattel, on another's land through no fault or contributory negligence of his own, is privileged to enter the possessor's land to retake the chattel, he must make a demand on the possessor, either to deliver the chattel at the border of his property or to permit the chattel owner to enter to retrieve the chattel, unless such a demand would be futile or the delay necessary therefor would subject the chattel to serious harm.⁵⁷ Otherwise, where personal property is placed or left on the real property of another by the fault of its owner, the owner of the chattel may not enter for the purpose of retaking it without becoming a trespasser by his entry.⁵⁸ This principle is applicable whenever there has been a tortious dispossession or wrongful receipt of the personalty by the owner of the real property,⁵⁹ or when the chattel has been placed on the land without the fault or consent of either party,⁶⁰ or through the equal fault of both parties, as, for example, by failing to repair a partition fence, by reason of which the cattle of one stray into the close of the other.⁶¹

of a servant, or employee, see § 70.

53. *Scribner v Beach* (NY) 4 Denio 448; *Hite v Long*, 27 Va 457.

54. *Powers v Tilley*, 87 Me 34, 32 A 714.

Where a trespasser has carried away a pole belonging to another and used it in constructing a staging for his own use, the owner is justified in removing it from the staging without giving notice to the trespasser, and if the latter sustains any damage by reason of the falling of the staging because of the removal of the pole without notice to him, the loss is *damnum absque injuria*. *White v Twitchell*, 25 Vt 620.

As to the acquisition of title by a trespasser through accession, see 1 Am Jur 2d, *Accession*, and *Confusion* §§ 9-14.

55. § 109.

56. Restatement, Torts 2d § 198(2).

57. Restatement, Torts 2d § 198, Comment d.

58. *McGill v Holman*, 208 Ala 9, 93 So 848, 31 ALR 941; *Chambers v Bedell* (Pa) 2 Watts & S 225.

59. *Bobb v Bosworth*, 16 Ky 81; *Powers v Tilley*, 87 Me 34, 32 A 714; *Stuyvesant v Wilcox*, 92 Mich 233, 52 NW 465.

60. *Livezey v Philadelphia*, 64 Pa 106; *Maulsby v Cook*, 134 Wash 133, 235 P 23.

61. *Chambers v Bedell* (Pa) 2 Watts & S 225.

One whose cattle have strayed upon the lands of another, who has unlawfully impounded them, is entitled to enter the latter's premises for the purpose of demanding the return of his property. *Arlowski v Foglio*, 105 Conn 342, 135 A 397, 53 ALR 481.

Generally as to the use of force in retaking possession of property, see 6 Am Jur 2d, *Assault and Battery* § 169.

V. REMEDIES; DAMAGES [§§ 110-161]

A. IN GENERAL [§§ 110-116]

Research References

ALR Digest to 3d, 4th, and Federal: Action or Suit § 95; Injunctions §§ 63-79; Trespass § 15

Index to Annotations: Consequential Damages; Damages; Injunctions; Intentional, Wilful, and Wanton Acts; Joint Tortfeasors; Loss of Enjoyment or Use; Multiple Damages; Nominal Damages; Property Damage; Punitive Damages; Restatement of Torts; Trespass

23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 3, 42, 43

20 Am Jur POF2d 115, Damages: Value of Growing Crops; 42 Am Jur POF2d 247 § 5, Damages for Injury to Real Property; 48 Am Jur POF2d 153, Damages for Unauthorized Geophysical Exploration

Restatement, Torts 2d §§ 901-903, 906

Speiser, Krause, and Gans, The American Law of Torts § 23:19-23:22, 23:31

1. OVERVIEW OF COMMON LAW AND EQUITABLE REMEDIES [§§ 110-112]

§ 110. Generally; remedy of assumpsit

An action at law for damages,⁶² and the equitable remedy of an injunction, where the trespass threatens to continue,⁶³ are among the remedies available for trespass. Furthermore, it has been said that the right to oust a stubborn trespasser is one twig in the bundle of property rights.⁶⁴

In agreement with the position of some authorities that equity will not aid in the collection of penalties,⁶⁵ a statutory penalty for trespass upon real property is recoverable only in an action at law.⁶⁶

§ 111. Remedy of assumpsit

In the absence of a statute providing to the contrary, assumpsit does not lie for a naked trespass on lands.⁶⁷ However, if the wrongful act of trespassing on real property results in some benefit to the property or estate of the trespasser, then the law will imply a promise on his part to pay for the benefits received, and assumpsit may, subject to certain qualifications and limitations,

62. § 117.

63. § 113.

64. *Bank of Steele v Lang* (ND) 423 NW2d 504, later proceeding (ND) 441 NW2d 648.

Law Reviews: Handley, Trespass to land as a remedy for unlawful intrusion on privacy. 62 Austl. LJ 216-22 (March 1988).

65. 27 Am Jur 2d, Equity § 84.

66. *Hendrix v Black*, 132 Ark 473, 201 SW 283.

As to statutory penalties and fines for trespass, see §§ 153 et seq.

67. *Downs v Finnegan*, 58 Minn 112, 59 NW 981; *Raven Red Ash Coal Co. v Ball*, 185 Va 534, 39 SE2d 231, 167 ALR 785; *Wilson v Shrader*, 73 W Va 105, 79 SE 1083.

Definition: An action for assumpsit is an action for the recovery of damages for the nonperformance of an oral or a simple written contract, which may be express or implied and may be for the payment of money. *Blanton v Blanton*, 40 NC App 221, 252 SE2d 530.

For discussion of actions for assumpsit, generally, see 1 Am Jur 2d, Actions §§ 11-18.

be maintained.⁶⁸ For instance, an action of assumpsit on an implied contract to pay for use and occupation is an available remedy for a trespass in transporting across plaintiff's property coal, other than that for which defendant had an easement, although the value of plaintiff's property was not thereby impaired.⁶⁹

§ 112. —Necessity of waiver of trespass

Where a portion of the real property has been severed and converted, the owner thereof may, as a general rule, waive the trespass and proceed against the trespasser in assumpsit for the recovery of such damages as he may have sustained,⁷⁰ though in those jurisdictions adopting the rule that to enable an owner of goods to waive the tort and sue in assumpsit where they have been wrongfully taken from him, the goods must have been converted into money, assumpsit will not lie unless what has been severed has been sold, it being insufficient that the property has been consumed.⁷¹

The rule of waiver has been applied where the owner of cattle has tortiously turned them upon another's land⁷² and where one has entered upon another's land and has removed timber or trees,⁷³ stone,⁷⁴ or other property.⁷⁵

If the occupancy of a trespasser, who severs trees or stone from the land of another for his own use, is such as to create an adverse possession, assumpsit will not lie for the value of such property, since assumpsit does not lie to try title to realty.⁷⁶

2. REMEDY FOR CONTINUING TRESPASS [§§ 113–116]

§ 113. Generally; injunctive relief

The threat of continuing trespass entitles a property owner to injunctive relief where irreparable injury may result.⁷⁷ For instance, the usual remedy for

68. *Tsuboi v Cohn*, 40 Idaho 102, 231 P 708, 39 ALR 851; *Raven Red Ash Coal Co. v Ball*, 185 Va 534, 39 SE2d 231, 167 ALR 785; *Wilson v Shrader*, 73 W Va 105, 79 SE 1083.

■■■■ *Observation:* In cases of trespass where there is no indication of actual monetary loss, to prevent a premium on trespassing, damages may be measured by the benefit gained by the trespasser. § 126.

69. *Raven Red Ash Coal Co. v Ball*, 185 Va 534, 39 SE2d 231, 167 ALR 785.

70. *Tsuboi v Cohn*, 40 Idaho 102, 231 P 708, 39 ALR 851; *Raven Red Ash Coal Co. v Ball*, 185 Va 534, 39 SE2d 231, 167 ALR 785; *Wilson v Shrader*, 73 W Va 105, 79 SE 1083.

71. *Gilmore v Wilbur*, 29 Mass 120; *Stearns v Dillingham*, 22 Vt 624.

72. *Monroe v Cannon*, 24 Mont 316, 61 P 863; *Norden v Jones*, 33 Wis 600.

As to trespass by animals, generally, see 4 Am Jur 2d, Animals §§ 40 et seq.

73. *Roberts v Moss*, 127 Ky 657, 106 SW 297; *Whidden v Seelye*, 40 Me 247; *Evans v Miller*, 58 Miss 120.

As to trespass by cutting of timber on private lands, see 52 Am Jur 2d, Logs and Timber §§ 115 et seq.

74. *Downs v Finnegan*, 58 Minn 112, 59 NW 981.

75. *Fiquet v Allison*, 12 Mich 328 (crops).

76. *Downs v Finnegan*, 58 Minn 112, 59 NW 981.

As to trespass to try title, generally, see 25 Am Jur 2d, Ejectment § 4.

77. *New York State NOW v Terry* (CA2 NY) 886 F2d 1339, 14 FR Serv 3d 922, later proceeding (SD NY) 1990 US Dist LEXIS 1905, withdrawn, reported at (SD NY) 732 F Supp 388, motion to vacate den (SD NY) 737 F Supp 1350 and cert den (US) 109 L Ed 2d 532, 110 S Ct 2206.

Where the defendants were enjoined from entering the plaintiff's shopping centers to perform dances in protest of nuclear arms, by limiting their license to be on the premises except as shoppers, where the conditions for entry on the land were expressed by the terms of the injunction and the injunction was violated, a trespass occurred. *Jacobs v Major*, 139 Wis 2d 492, 407 NW2d 832.

a continuing trespass is a permanent injunction which, in the case of an encroachment on the plaintiff's land, would be a mandatory injunction for removal of the encroachment.⁷⁸ Factors to be considered in determining whether to grant a mandatory injunction requiring a trespassing defendant to remove an encroachment from the plaintiff's land, are whether the owner acted in good faith or intentionally built on the adjacent land and whether the hardship incurred in removing the structure is disproportionate to the harm caused by the encroachment; however, mere inconvenience and expense are not sufficient to withhold injunctive relief.⁷⁹

■■■ Observation: Where the encroachment of a trespass is minimal and the cost of removing the encroachment is most likely substantial, two competing factors must be considered in fashioning a remedy: on one hand, without court intervention, a defendant may be forced to buy plaintiff's land at a price many times its worth rather than destroy the building that encroaches; on the other hand, without the threat of a mandatory injunction, builders may view the legal remedy as a license to engage in private eminent domain.⁸⁰

Where numerous acts which constitute a trespass are being committed, and their continuance is imminent, and the injury resulting from each act is, or would be, trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, the owner may resort in the first instance to a court of equity for appropriate relief.⁸¹ The very fact that the trespasses are in themselves trifling, and the damage, if any, so small that suits at law to recover would be impracticable, affords a reason for granting an injunction,⁸² since in such a case the remedy at law would not be adequate, and the injuries sustained, before even inadequate relief at law could be obtained, would become irreparable.⁸³

§ 114. Successive actions

A continuing trespass confers on the possessor of the land an option to

Forms: Complaint, petition, or declaration—Allegation—Irreparable damage—Acts amounting to destruction of property or dispossession. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 42.

—Continued or repeated trespass may ripen into prescriptive easement. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 43.

78. *Williams v South & South Rentals, Inc.*, 82 NC App 378, 346 SE2d 665.

79. *Williams v South & South Rentals, Inc.*, 82 NC App 378, 346 SE2d 665.

Annotations: Mandatory injunction to compel removal of encroachments by adjoining landowner, 28 ALR2d 679.

80. *Williams v South & South Rentals, Inc.*, 82 NC App 378, 346 SE2d 665.

As to trespass as affected by eminent domain, generally, see numerous sections in 27 Am Jur 2d, Eminent Domain.

81. *Lembeck v Nye*, 47 Ohio St 336, 24 NE 686.

State law allows the remedy of an injunction to prevent a continuing trespass to a property right. *United States v Gilbert* (ND Ga) 720 F Supp 1554, affd in part and revd in part (CA11 Ga) 920 F2d 878.

For discussion of a continuing, as distinct from a single, trespass, generally, see § 2.

Annotations: Injunction against repeated or continuing trespasses on real property, 60 ALR2d 310.

82. *Pollock v Cleveland Shipbuilding Co.*, 56 Ohio St 655, 47 NE 582.

As to a remedy by way of injunction for a continuing trespass, see 42 Am Jur 2d, Injunctions § 149.

Forms: Complaint, petition, or declaration—Trespass to real property—Seeking damages and injunction. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 3.

83. *Boring v Hunt*, 12 Ohio NP NS 472, 22 Ohio DNP 543.

maintain a succession of actions based on a theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass.⁸⁴ Further, if a trespass is continuing, any person in possession of the land at any time during its continuance may maintain an action for trespass.⁸⁵

Where a trespass is a continuing one, and not of that class of permanent appropriations to be assessed for all time at once, there may be successive actions for each continuance of the trespass.⁸⁶ However, it also has been stated that damages for a continuing trespass must be sought in one action and not in successive causes of action for continuing trespass.⁸⁷ Several actions cannot be maintained to recover damages for a single and completed trespass upon and injury to the entire tract of land, and a recovery of damages in respect to a portion of the land will bar a subsequent action for recovery of damages to the same tract, the cause of action being entire and indivisible.⁸⁸ However, a continuing trespass is to be distinguished from a series of separate trespasses on land in that a continuing trespass is actionable by the possessor, even if the intrusion or entry was originally made on the land pursuant to consent or privilege, thus the rule of continuing trespass is applicable after the transfer of ownership or possession, a matter of importance where a trespass action for the original entry is barred by the statute of limitations.⁸⁹

§ 115. Practice guide: allegations for injunctive relief

If an injunction is sought as a remedy for a continuing trespass instead of, or in addition to, damages,⁹⁰ facts must be alleged which show the inadequacy of a remedy at law, such as:

- Continuance or repetition, or the threat to continue of repeat, a trespass.
- Irreparable injury.
- Destruction or injury to land or to the use and enjoyment of the land amounting to virtual dispossession.
- Danger that the defendant's acts may ripen into a prescriptive easement.
- Insolvency or financial irresponsibility of the defendant.
- Impossibility or extreme difficulty of ascertaining damages.
- Need for a multiplicity of actions to obtain redress in damages.

§ 116. —Factors in determining appropriateness of injunction

The appropriateness of the remedy of injunction against a trespass depends upon a comparative appraisal of all the factors in the case, including the following primary factors:

- The nature of the interest to be protected.
- The relative adequacy of injunctive and other remedies available to the plaintiff.

⁸⁴. *Regan v Cherry Corp.* (DC RI) 706 F Supp 145.

Forms: Complaint, petition, or declaration—Allegation—Multiplicity of suits. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Form 41.

⁸⁵. *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176 (if the possessory interest in the land has been transferred subsequent to the actor's placing of the thing on the land which constitutes a trespass, the transferee of the land may maintain

an action for its continuance there).

⁸⁶. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

⁸⁷. *Williams v South & South Rentals, Inc.*, 82 NC App 378, 346 SE2d 665.

⁸⁸. § 79.

⁸⁹. Restatement 2d, Torts § 160, Comments f, h.

⁹⁰. § 113.

- Any unreasonable delay of the plaintiff in initiating the action.
- Any related misconduct on the part of the plaintiff.
- The relative hardship to the parties if the injunction is granted or denied.
- The interests of the third persons and the public.
- The practicability of framing and enforcing the injunction.⁹¹

B. DAMAGES [§§ 117–161]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass §§ 10, 15

Index to Annotations: Consequential Damages; Damages; Injunctions; Intentional, Wilful, and Wanton Acts; Joint Tortfeasors; Loss of Enjoyment or Use; Multiple Damages; Nominal Damages; Property Damage; Punitive Damages; Trespass

8 Am Jur Pl & Pr Forms (Rev), Damages, Forms 72-79, 111-117, 263, 264

Restatement, Torts 2d §§ 162, 902, 903, 904, 905, 907, 910, 917

Speiser, Krause, and Gans, The American Law of Torts § 23:31

1. IN GENERAL [§§ 117–125]

§ 117. Generally

From every unlawful entry,⁹² or every direct invasion of the person or property of another, the law infers some damage.⁹³

One injured by the trespass of another is entitled to recover damages from the other for all harm, past, present, and prospective, legally caused by the trespass.⁹⁴ Thus, the trespasser is liable for all direct consequences of any conduct engaged in while trespassing, and for indirect consequences, some of which have not been reasonably foreseeable, of conduct engaged in while trespassing.⁹⁵

§ 118. Purpose of award of damages

|||| Practice guide: In general, the rules for determining damages in any tort action, including trespass, are based upon the purposes for which such actions are maintainable. These purposes are:

- To give compensation, indemnity, or restitution for harms.
- To determine rights.
- To punish wrongdoers and deter wrongful conduct.
- To vindicate parties and deter retaliation or violent and unlawful self-help.⁹⁶

Actual damages, sometimes called compensatory damages, are the damages awarded to a person as compensation, indemnity, or restitution for harm

91. Restatement, Torts 2d § 936(1)(a)-(g).

92. *Morrison v Smith* (Tenn App) 757 SW2d 678.

93. *Longenecker v Zimmerman*, 175 Kan 719, 267 P2d 543; *Pearl v Pic Walsh Freight Co.* (Hamilton Co) 112 Ohio App 11, 15 Ohio Ops 2d 338, 168 NE2d 571; *Hawkins v Schroeter* (Tex Civ App) 212 SW2d 843.

If nothing more, the treading down of the

grass or herbage is inferred from a trespass. *Morrison v Smith* (Tenn App) 757 SW2d 678.

As to particular types of damages for trespass, including actual, nominal, exemplary, punitive and multiple damages, see §§ 141 et seq.

94. Restatement, Torts 2d § 910.

95. § 142.

96. Restatement, Torts 2d § 901.

sustained by him, and are distinct from nominal damages, which are intended neither to compensate the plaintiff nor to punish the trespasser.⁹⁷

The purpose of a compensatory damage award for trespass is to make the plaintiff whole,⁹⁸ and to compensate the owner for the injury received.⁹⁹ In an action of trespass, the prevailing plaintiff is ordinarily entitled to an amount which will compensate him for actual damages sustained as a direct result of the act of trespass,¹ although, under the modern view, damages need not be awarded where a trespass on land was nondeliberate and caused no actual damage.²

Punitive, or exemplary, damages are damages other than compensatory or nominal damages, and are intended to punish the defendant for outrageous conduct, and to deter him and others from similar conduct in the future.³

■■■■ *Distinction:* Although the purposes are the same, the effect of an award of punitive damages in an action for trespass is not the same as that of a fine imposed after a conviction of criminal trespass, since the successful plaintiff, and not the state, is entitled to the money required to be paid by the defendant.⁴

§ 119. Accrual of damages

Where the act complained of constitutes a proper ground for an action of trespass, all damages of which the act was the efficient cause, and for which the plaintiff is entitled to recover in any form, may be recovered in such action although in point of time they did not result until some time after the act was committed.⁵ Continuing damages arising after the commencement of the suit may be awarded if they proceed from the act therein complained of as the cause of action.⁶

In the case of repeated trespasses, as a general rule, recovery can be had only up to the commencement of the suit.⁷ In some states, however, even in such cases, the plaintiff may recover all damages which have accrued down to the time of the trial.⁸

97. § 141.

98. 22 Am Jur 2d, Damages § 26.

99. *Miloszar v Gonzalez* (Tex Civ App Corpus Christi) 619 SW2d 283.

An award of damages in an action for trespass is intended to compensate an injured party for the wrong done to him; the goal is to place that injured party as nearly as reasonably possible in the same position he would have been in had the injury not been inflicted. *Rodrian v Seiber* (5th Dist) 194 Ill App 3d 504, 141 Ill Dec 585, 551 NE2d 772.

For discussion of the purpose of compensatory damages for a nonpecuniary loss, such as bodily harm and mental distress, see § 143.

1. § 141.

2. § 121.

3. § 148.

4. Restatement, Torts 2d § 908, Comment a.

As to multiple damages and penalties under trespass statutes, generally, see §§ 153 et seq.

For discussion of criminal trespass, generally, see §§ 162 et seq.

5. *Dickinson v Boyle*, 34 Mass 78.

6. *Cosgriff v Miller*, 10 Wyo 190, 68 P 206.

7. *Indiana, B. & W.R. Co. v Eberle*, 110 Ind 542, 11 NE 467; *Fremont, E. & M.V.R. Co. v Harlin*, 50 Neb 698, 70 NW 263; *Amerman v Deane*, 132 NY 355, 30 NE 741.

The trial court erred in awarding the plaintiff \$900 in damages for trespass on his land based on \$100 per year for nine years, where although there was evidence of actual damages in the amount awarded, the trial judge awarded damages for years outside the six year limitations period requiring the award to be modified down. *Butler v Lindsey* (App) 293 SC 466, 361 SE2d 621.

8. *Chicago & E.I.R. Co. v Loeb*, 118 Ill 203, 8 NE 460; *Ridley v Seaboard & R.R. Co.*, 118 NC

Where a trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, but where the trespass is temporary in character, only those damages may be recovered which have accrued up to the time of the commencement of the action, since it is not to be presumed that the trespass will continue.⁹

The mere fact that the plaintiff chooses to invoke the equitable jurisdiction of the court because of a continuing trespass does not affect his right to damages for the trespass up to the date of the decree.¹⁰ Nor does the transfer of title to the land after the original trespass preclude the transferee's action where the wrong is a continuing one unless, of course, the original owner recovered in full for all present and prospective damage therefrom.¹¹

§ 120. Assessment and review of damages

The assessment of damages, where the damages are shown by competent evidence, is within the sound discretion of the jury and those damages once assessed are presumed correct,¹² particularly where the award is not so unreasonable or so disproportionate to the value of the land, in light of the harm done, to justify reversal.¹³ Notwithstanding the sufficiency of the evidence, given by the plaintiff, as to the value of damages suffered as a result of trespass, to allow the question to go to the jury, the jurors need not accept plaintiff's assessment of the diminution in the value of the property and may adopt a substantially lower assessment.¹⁴

Although an award of damages for a trespass to real property must be supported by some evidence of the value of property damaged or expenses incurred, a monetary award based on a judgmental approximation of damages resulting from a trespass is proper, provided the evidence establishes facts from which the amount of damages may be determined to a probability.¹⁵

■■■■ Illustration: Where the evidence of the injury sustained by the plaintiffs, the cutting of 575 trees, ground damage from heavy equipment, and a per-acre decrease in value from between \$1,000 and \$1,500 to \$125,

996, 24 SE 730, later app 124 NC 34, 32 SE 325 and later app 124 NC 37, 32 SE 379; Puckett v Smith, 36 SCL 26.

9. Kornoff v Kingsburg Cotton Oil Co., 45 Cal 2d 265, 288 P2d 507.

10. Wilson v Burgess, 186 Kan 480, 350 P2d 776.

As to injunctive relief to redress a continuing trespass, generally, see § 113.

11. Barberi v Bochinsky, 43 NJ Super 186, 128 A2d 1.

12. Hollis v Wyrosdick (Ala) 508 So 2d 704; Statler v Catalano (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; Currier v Cyr (Me) 570 A2d 1205.

An appellate court was unable to say that a nominal award of damages in the amount of \$1,250 for trespass was excessive where damages for dispossession are regarded as an award of compensatory damages is not con-

finied to proof of actual pecuniary loss. Owens v Smith (La App 2d Cir) 541 So 2d 950.

Although whether a trespass occurred and whether there were consequential damages to respondent's property was a question of fact to be determined by the jury, where the trial court determined that there was substantial evidence to sustain a charge of trespass and further found that a nominal award of damages was appropriate, where the record did not contradict such finding the appellate court would affirm the award. Kenney v Koch, 227 Mont 155, 737 P2d 491.

13. Rodrian v Seiber (5th Dist) 194 Ill App 3d 504, 141 Ill Dec 585, 551 NE2d 772 (where, to restore land to its original contours would cost \$18,000, without considering the cost of replacing the trees and vegetation destroyed, a jury award of \$20,000 is not unreasonable or disproportionate).

14. Ingram v Summerlin, 179 Ga App 832, 348 SE2d 68.

15. § 157.

clearly supports a damages award in the amount assessed by the jury, the method of computation of the verdict amount based on that evidence will not be questioned on review, either by the trial court on postjudgment motion or by the appellate court on appeal.¹⁶

Adaptability of the property for a special purpose effecting its value is an element for the consideration of the jury in assessing damages in an action for trespass.¹⁷

■■■■ Observation: The trial court is granted much discretion with respect to damages assessed against a trespasser, and may allow the recovery of damages for mental anguish, humiliation, and embarrassment,¹⁸ as well as for the invasion of the plaintiff's property right.¹⁹

§ 121. —Effect of finding of trespass without award of damages

A jury verdict finding that there was a trespass but no damages, either nominal or compensatory, is invalid and incomplete, so that the judgment based thereon must be considered a nullity.²⁰

Another view is that it is possible for the jury to find that a trespass was committed but to award no damages therefor where the trespass was nondeliberate and caused no actual damage.²¹ Thus, nominal damages need not be awarded where no actual loss has occurred.²²

■■■■ Observation: A number of jurisdictions have adopted the "modern view" that when the trespass is nondeliberate or unintentional, damages need not be awarded where the trespass causes no injury.²³

§ 122. Mitigation of damages

The circumstances surrounding a trespass may be considered for the purpose of mitigating the damages.²⁴

16. *Hollis v Wyrosdick* (Ala) 508 So 2d 704.

Where there was sufficient evidence of damages to support the verdict in the testimony of a landscaper, who viewed the premises of the appellees, who sued the appellants for trespass for digging a ditch across his residential lot, damaging the land and trees, and gave his opinion that the damages were \$4,935, the jury verdict for the appellees of almost \$5,000 was affirmed. *Sunland Enterprises, Inc. v McGuckin*, 295 Ark 424, 749 SW2d 304.

17. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042 (harmful emissions of lead particular matter onto the plaintiff's property).

18. § 145.

19. *Beasley v Mouton* (La App 1st Cir) 408 So 2d 446.

Speiser, Krause, and Gans, *The American Law of Torts* § 23:31.

20. *Costerisan v Melendy* (5th Dist) 255 Cal App 2d 57, 62 Cal Rptr 800.

For definitions of and distinctions between

actual, or compensatory, and nominal damages, see § 110.

21. *Wernberg v Matanuska Electric Asso.* (Alaska) 494 P2d 790.

22. *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165.

23. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042 (court refusing to accept so-called modern view).

24. *McAfee v Crofford*, 54 US 447, 14 L Ed 217; *Shores v Brooks*, 81 Ga 468, 8 SE 429; *Sutherland v Ingalls*, 63 Mich 620, 30 NW 342.

The trial court did not err in failing to give a charge on mitigation of damages, in a trespass action against the defendant for wrongfully destroying trees and vegetation on the plaintiff's land, where the evidence showed that the defendant's equipment was operated on plaintiff's land on one day for a period of approximately 4 hours and there was no evidence suggesting any opportunity on the part of the plaintiff to mitigate the damages to her land. *Ingram v Summerlin*, 179 Ga App 832, 348 SE2d 68.

Property owners were not liable in trespass

Damages in an action of trespass cannot be mitigated either by proof of an offer to return the goods, in the absence of an acceptance of the offer,²⁵ or by showing an independent debt due from the plaintiff to the defendant.²⁶ It is no ground for mitigation of damages caused to property by a continuing trespass thereon that if such property had been in a good state of repair the wrongful invasion would not have damaged it.²⁷

The defendant may show in mitigation of damages that the owner derived some benefit from the trespass,²⁸ although the right of mitigation in such cases has been denied by some authorities.²⁹

§ 123. Aggravation of damages

Circumstances accompanying and giving character to an act of trespass may always be shown in aggravation of damages,³⁰ as, for example, that personal wrongs were committed during a trespass to realty,³¹ that a building has been destroyed wantonly and maliciously,³² that a tenant has been injured unnecessarily in being ejected from premises,³³ that a pistol was discharged with gross negligence and culpable carelessness,³⁴ or that an officer seized, under process, property which he knew to be exempt.³⁵ It is in those cases where the trespass is aggravated by circumstances of gross recklessness and deliberate disregard of the victim's right that it is said that mental anguish is reasonably calculated or expected to result to the victim.³⁶

|||| Practice guide: Where the trespass is not aggravated by circumstances of gross recklessness or deliberate disregard of the victim's rights, the burden of proving actual mental anguish damages is much greater because of the absence of reasonably expected mental anguish; but where

to an adjoining landowner in plugging a drain line broken when they rightfully excavated on their property and removing the contaminated soil where they had no knowledge of the drain pipe running under their property and were required to mitigate their damages and prevent a possible health hazard. *Branstetter v Beaumont Supper Club, Inc.*, 224 Mont 20, 727 P2d 933.

As to mitigation of damages, generally, see 22 Am Jur 2d, Damages §§ 965-967.

25. *Carpenter v Dresser*, 72 Me 377; *Woolley v Carter*, 7 NJL 85.

26. *Hobart v Hagget*, 12 Me 67; *Kunkel v Utah Lumber Co.*, 29 Utah 13, 81 P 897.

27. *Huber v Stark*, 124 Wis 359, 102 NW 12.

28. *Mayo v Springfield*, 138 Mass 70; *Burtraw v Clark*, 103 Mich 383, 61 NW 552.

Generally as to the right of the defendant to show that the act complained of is of benefit to the plaintiff, see 22 Am Jur 2d, Damages § 204.

29. *Pinney v Winchester*, 83 Conn 411, 76 A 994; *Read v Webster*, 95 Vt 239, 113 A 814, 16 ALR 1068.

30. *Meagher v Driscoll*, 99 Mass 281; *Dickinson v Boyle*, 34 Mass 78; *Kurpgeweit v Kirby*,

88 Neb 72, 129 NW 177; *Adams v Blodgett*, 47 NH 219.

For a discussion of aggravation of damages generally, see 22 Am Jur 2d, Damages §§ 199 et seq.

As to pleading matters in aggravation of damages, see 22 Am Jur 2d, Damages §§ 866-869.

31. *May v Western Union Tel. Co.*, 157 NC 416, 72 SE 1059; *Brame v Clark*, 148 NC 364, 62 SE 418.

32. *Curtiss v Hoyt*, 19 Conn 154.

33. *Vinson v Flynn*, 64 Ark 453, 43 SW 146.

34. *Welch v Durand*, 36 Conn 182.

35. *Lynd v Pickett*, 7 Minn 184.

For discussion of trespass ab initio, generally, see §§ 61 et seq.

As to the liability of a public officer for acts committed in the line of duty, see 63A Am Jur 2d, Public Officers and Employees § 372.

For discussion of breaking and entering by officer to execute civil process, see 62B Am Jur 2d, Process § 295.

36. *Harkness v Porter* (La App 2d Cir) 521 So 2d 832, cert den (La) 523 So 2d 1323 (recognizing rule).

the burden is met and actual damages are proved, even though not reasonably expected, the victim should be allowed the damages.³⁷

§ 124. —Preventable losses

If the damages resulting from a trespass are aggravated by the neglect or carelessness of the person injured, such part as is attributable to his own fault cannot be recovered.³⁸ However, whenever one's right to his property is willfully or criminally invaded by a continuing tort, and injury arises therefrom, he may recover any damages sustained by reason of such invasion, and is not bound to do any act to relieve the tortfeasors of the ordinary consequences of their wrongs.³⁹ This is especially true where the trespassers have profited by their tort.⁴⁰

§ 125. Apportionment of damages

Each cotrespasser is liable for the whole damage,⁴¹ and when there are several defendant cotrespassers, the jury cannot apportion the damages on the basis of the culpability of each cotrespasser respectively and tender separate verdicts for the amounts thus apportioned, but the verdict and judgment must go against all jointly.⁴² Thus, a defendant, found liable for punitive damages in an action for trespass, was not entitled to seek statutory contribution from its codefendant for a proportionate share of the legal expenses levied against them as punitive damages, even though all defendants were joint tortfeasors and in *pari delicto*, where they are not joint judgment debtors as required by statute.⁴³

2. MEASURE OF DAMAGES [§§ 126–140]

a. IN GENERAL [§§ 126–129]

§ 126. Injury to property and persons, generally

There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property resulting from a trespass.⁴⁴ The measure of damages differs according to the nature of the injury.⁴⁵ Whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.⁴⁶

³⁷ *Harkness v Porter* (La App 2d Cir) 521 So 2d 832, cert den (La) 523 So 2d 1323.

³⁸ *Gilbert v Kennedy*, 22 Mich 117; *Shannon v McNabb*, 29 Okla 829, 120 P 268.

For a discussion of the doctrine of avoidable consequences, see 22 Am Jur, *Damages* §§ 495 et seq.

³⁹ *Shannon v McNabb*, 29 Okla 829, 120 P 268.

⁴⁰ *Shannon v McNabb*, 29 Okla 829, 120 P 268.

⁴¹ § 66.

⁴² *Bivins v McElroy*, 11 Ark 23; *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008.

For discussion of contribution among joint tortfeasors, see 18 Am Jur 2d, *Contribution* §§ 40 et seq.

As to the nature of the liability of joint tortfeasors, generally, see 74 Am Jur, *Torts* 2d §§ 61 et seq.

⁴³ *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008.

⁴⁴ *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

⁴⁵ *Denke v Mamola* (SD) 437 NW2d 205.

⁴⁶ *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

Harm to property includes the destruction, physical impairment, or wrongful taking of any thing that is the subject of ownership; the subjection of the property to a lien or other encumbrance; and, an intentional interference with contracts.⁴⁷

The measure of damages for tortious injury to property is the amount which will compensate for all the detriment proximately caused thereby.⁴⁸ Damages for the dispossession of property are regarded as an award of compensatory damages for the violation of a recognized property right and encompass more than actual pecuniary loss.⁴⁹

■■■■ *Practice guide:* If one is entitled to a judgment for detention of or preventing the use of either land or chattels, the damages include compensation for:

—The value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute; and

—The harm to the property or other harm of which the detention is the legal cause.⁵⁰

In cases of trespass where there is no indication of actual monetary loss, to prevent a premium on trespassing, damages may be measured by the benefit gained by the trespasser.⁵¹

Anguish, humiliation, embarrassment, distress, discomfort, annoyance, other mental suffering resulting from a trespass, committed under circumstances of insult, rude language or treatment, haughtiness, and contempt are appropriate considerations in the measure of damages resulting from a trespass.⁵²

§ 127. Significance of injury as permanent or temporary

The measure of damages to be awarded for an injury resulting from a trespass depends upon whether the injury is permanent or temporary,⁵³ and, in the case of trespass to real property, is dependent upon whether the claimant's tenure is such as to entitle him to recover for a permanent injury to the property or merely for a temporary injury to his use and enjoyment of it, in other words, upon whether the plaintiff's interest is in the freehold or is possessory only.⁵⁴

■■■■ *Distinction:* A temporary injury is one which may be abated or discontinued at any time, either by an act of the wrongdoer or by the

47. Restatement, Torts 2d § 906, Comment b.

■■■■ *Observation:* For the breach of an obligation not arising from a contract, the measure of damages, except where otherwise provided by law, is the amount which will compensate for all the detriment approximately caused thereby, whether it could have been anticipated or not. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027 (trespass in newsgathering).

48. *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

49. *Owens v Smith* (La App 2d Cir) 541 So 2d 950.

■■■■ *Definition:* Compensatory damages are

damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him from, in this case, a trespass. § 117.

As to the requirement of proof of actual pecuniary loss, see § 158.

50. Restatement, Torts 2d § 931(a) and (b).

51. *Salesian Soc. v Ellenville* (3d Dept) 121 App Div 2d 823, 505 NYS2d 197.

52. § 145.

53. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Moore v Rotello* (Tex App Houston (14th Dist)) 719 SW2d 372, writ ref n re (Jan 21, 1987) and reh'g of writ of error overr (Feb 25, 1987).

54. § 130.

injured party;⁵⁵ and, when injury to property is remedial by restoration or repair, it is considered to be temporary.⁵⁶

■■■■ *Illustration:* The removal of gravel from a railroad's right-of-way is an example of a trespass resulting in a temporary injury, and the proper measure of damages is the amount of damages that have accrued during the continuance of the injury covered by the period for which the trespass action is brought or, stated differently, the amount necessary to place the owner of the property in the same position he occupied prior to the injury.⁵⁷

§ 128. —Measure of permanent injury

Whenever the injury resulting from a trespass is deemed to be permanent, the measure of damages is the decrease in the fair market value of the property,⁵⁸ except where there is a total destruction, in which case the owner is entitled to recover the entire value.⁵⁹ However, the actual cost of the thing injured or destroyed is not always the measure of damages in cases of trespasses to personalty.⁶⁰

In the case of a permanent injury, the recovery must include all damages, both past and future.⁶¹ In an action for trespass to real property, when the plaintiff both owns and occupies the land, he cannot recover damages for injury to the use and also for the permanent injury, since this would constitute double compensation.⁶²

■■■■ *Practice guide:* Where a trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, but where the trespass is temporary in character, only those damages may be recovered which have accrued up to the time of the commencement of the action, since it is not to be presumed that the trespass will continue.⁶³

■■■■ *Observation:* On the theory that an award of monetary damages for a permanent encroachment on real property is tantamount to a condemna-

55. 22 Am Jur 2d, Damages § 409.

56. § 137.

57. *Moore v Rotello* (Tex App Houston (14th Dist)) 719 SW2d 372, writ ref n re (Jan 21, 1987) and reh of writ of error overr (Feb 25, 1987).

As to damages for the tortious removal of earth, sand, and gravel, generally, see 22 Am Jur 2d, Damages § 426.

Annotations: Measure of damages for wrongful removal of earth, sand, or gravel from land, 1 ALR3d 801.

58. *Hughett v Caldwell County*, 313 Ky 85, 230 SW2d 92, 21 ALR2d 373; *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008; *Pappenheim v Metropolitan E., etc., R. Co.*, 128 NY 436, 28 NE 518; *Kirkbride v Lisbon Contractors, Inc.*, 385 Pa Super 292, 560 A2d 809; *Linder v Valero Transmission Co.* (Tex App Corpus Christi) 736 SW2d 807, writ ref n re (Oct 28, 1987) and reh of writ of error overr (Dec 2, 1987).

Forms: Complaint, petition, or declaration—Allegation of permanent injury to property—Difference between market value immediately before and after injury. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 72.

59. *Hughett v Caldwell County*, 313 Ky 85, 230 SW2d 92, 21 ALR2d 373; *Johnson v Farwell*, 7 Me 370; *Pappenheim v Metropolitan E., etc., R. Co.*, 128 NY 436, 28 NE 518.

Forms: Complaint, petition, or declaration—Allegation of total destruction of property—Fair market value at time of destruction. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 73.

60. § 139.

61. *Kornoff v Kingsburg Cotton Oil Co.*, 45 Cal 2d 265, 288 P2d 507; *Fowle v New Haven & Northampton Co.*, 112 Mass 334; *Barker v Publishers' Paper Co.*, 78 NH 571, 103 A 757.

62. *Seely v Alden*, 61 Pa 302.

63. § 119.

tion by a private citizen without the right of eminent domain, courts have permitted permanent monetary damages only in situations involving a trespass by quasi-public entities, such as a telegraph company.⁶⁴

§ 129. —Measure of temporary damages

When injury to property resulting from a trespass is remedial by restoration or repair, it is considered to be temporary,⁶⁵ and the measure or damages is the cost of restoration and repair.⁶⁶

Some courts have applied, in actions of trespass, the rule that the cost of restoring the property to its former condition is the proper measure of damages for a temporary injury, when this is less than the diminution of the market value of the whole property; but where the cost of restoration is more than the diminution in the market value, the latter is deemed the true measure of damages.⁶⁷ While, ordinarily, in the case of damage by trespass to a chattel, it is not prudent to assume that repairs would be made if the cost of repairs would be materially greater than the value of the chattel before the harm, if the chattel has peculiar value or there would be a serious delay or inconvenience in obtaining a substitute, it may be reasonable to make repairs at an expense greater than the replacement of the chattel.⁶⁸

b. DAMAGE TO REAL PROPERTY [§§ 130–138]

(1) IN GENERAL [§§ 130–132]

§ 130. Generally

In general, the measure of damages for tortious injury to real property is the amount which will compensate for all the detriment proximately caused thereby,⁶⁹ considered in relation to the particular purpose for which the property is used,⁷⁰ and computed not merely with reference to the portion injured, but also to the effect of the injury on the whole parcel.⁷¹

Whenever a harm to land occurs from an invasion of property rights, the

64. *Williams v South & South Rentals, Inc.*, 82 NC App 378, 346 SE2d 665.

As to trespass as affected by eminent domain, generally, see numerous sections in 27 Am Jur 2d, Eminent Domain.

Law Reviews: Taking without compensation: Measure of permanent damages modified by application of limitation of actions for trespass, 20 Wake Forest L Rev 671-95 (Fall 1984).

65. *Denke v Mamola* (SD) 437 NW2d 205.

66. § 137.

67. *Waggener v Leggett*, 246 Miss 505, 150 So 2d 529; *Hartshorn v Chaddock*, 135 NY 116, 31 NE 997, reh den (NY) 32 NE 648.

Where the plaintiff's property received no permanent injury from the defendant's piling thereon logs and other debris, and it further appeared that the removal of the trees and other debris would eliminate the entire damage caused by the trespass, the cost of removing the trees and debris from the plaintiff's premises was a proper measure of the damage

sustained because of the trespass. *Sleep v Morrill*, 199 Or 128, 260 P2d 487.

68. § 139.

69. *Hammond v County of Madera* (CA9 Cal) 859 F2d 797; *Hawthorne v Siegel*, 88 Cal 159, 25 P 1114; *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Beach v Morgan*, 67 NH 529, 41 A 349; *Wood v Snider*, 187 NY 28, 79 NE 858.

As to the general rule for an award of damages for injury to real property, see 22 Am Jur 2d, Damages §§ 401, 402, 414.

70. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Saleian Soc. v Ellenville* (3d Dept) 121 App Div 2d 823, 505 NYS2d 197; *Murphy v Fond Du Lac*, 23 Wis 365.

71. *Waggener v Leggett*, 246 Miss 505, 150 So 2d 529; *Barker v Publishers' Paper Co.*, 78 NH 571, 103 A 757.

measures of damage to be considered are the difference in the value of the land before and after the harm, the loss of the use of the land, and the discomfort and annoyance to the party harmed as an occupant.⁷²

■■■■ *Caution:* Those who use another's land without permission may justifiably have "risks of losses" allocated to them far beyond those normally imposed when liability is imposed on a negligence theory; under the law of some jurisdictions, the consequences flowing from an intentional tort such as a trespass may include emotional distress even without a physical injury to the person or to the land.⁷³

The measure of damages to be awarded for an injury resulting from a trespass to real property, is dependent upon whether the claimant's tenure is such as to entitle him to recover for a permanent injury to the property or merely for a temporary injury to his use and enjoyment of it, in other words, upon whether the plaintiff's interest is in the freehold or is possessory only.⁷⁴

■■■■ *Definition:* Damage to real estate is considered to be permanent when it is of such a character and existing under such circumstances that it will be presumed to continue indefinitely, when it is irremediable, or when it inconveniences the owner in its right and accustomed use, and requires great time and expense to restore it to its former condition.⁷⁵

§ 131. Determination of applicable measure

The measure of damages for a trespass to realty depends on that criterion which will best accomplish the goal of compensating the owner for the injury received.⁷⁶ There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.⁷⁷

Regardless which measure of damages a court applies, such rules serve as guidelines only and are not to be applied in an arbitrary, formulaic or inflexible manner in every instance so as to deprive an injured party of just compensation for a trespass to real property.⁷⁸

§ 132. —Plaintiff's election

A plaintiff may be allowed to elect between recovering, for trespass to land,

72. *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265.

Once a cause of action for trespass has been established, the landowner may also recover damages for annoyance and distress, discomfort and mental anguish, proximately caused by the trespass. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505.

73. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

As to damages for mental or emotional suffering in a trespass action, see § 145.

As to alternative measures of damages for

injury to real property by trespass, including the cost of restoration or repair, see §§ 133 et seq.

74. *Pearl v Pic Walsh Freight Co.* (Hamilton Co) 112 Ohio App 11, 15 Ohio Ops 2d 338, 168 NE2d 571.

Generally, as to damages in real property actions, see 22 Am Jur 2d, Damages §§ 401 et seq.

75. *Denke v Mamola* (SD) 437 NW2d 205.

76. *Miloszar v Gonzalez* (Tex Civ App Corpus Christi) 619 SW2d 283.

77. § 130.

78. *Rodrian v Seiber* (5th Dist) 194 Ill App 3d 504, 141 Ill Dec 585, 551 NE2d 772.

the difference in value caused by the damage or the reasonable cost of repair or restoration, where feasible.⁷⁹ Since the elements of harm as measured for an award of damages, that is, the difference in the value of the land before and after the harm, the loss of the use of the land, and the discomfort and annoyance to the plaintiff, are disjunctive, a plaintiff can elect to collect for one or more elements of damage.⁸⁰

(2) DIMINUTION IN VALUE [§§ 133–136]

§ 133. Generally

The usual measure of damages in trespass cases, or at least one such measure,⁸¹ is the difference between the value before and after the trespass,⁸² or the fair market value before and after the trespass,⁸³ or, in some cases, the lesser of the decline in market value and the cost of restoration.⁸⁴

Inasmuch as the purpose of a damage award is to make the plaintiff whole, compensating plaintiffs for the decline in the value of their property resulting from the defendant's trespass accomplishes such a purpose.⁸⁵ Even where

79. *Airtech Service, Inc. v MacDonald Constr. Co.* (Fla App D3) 150 So 2d 465.

If a property owner is entitled to a judgment for harm to land resulting from a past invasion, and not amounting to a total destruction of value, the damages include compensation, at the plaintiff's election in an appropriate case, for the difference between the value of the land before and after the trespass or for the cost of restoration that has been or may reasonably be incurred. Restatement, Torts 2d § 929(1)(a).

80. *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265.

As to the plaintiff's election of alternative measures of valuation of damage to property, generally, see 22 Am Jur 2d, Damages § 417.

81. *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

For discussion of the significance of permanent or temporary injuries with respect to the measure of damages, see § 127.

82. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Horn v Corkland Corp.* (Fla App D2) 518 So 2d 418, 13 FLW 139; *Ingram v Summerlin*, 179 Ga App 832, 348 SE2d 68; *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; *Currier v Cyr* (Me) 570 A2d 1205 (by implication); *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008; *Denke v Mamola* (SD) 437 NW2d 205; *Henderson v For-Shor Co.* (Utah App) 757 P2d 465, 84 Utah Adv Rep 42.

Restatement, Torts 2d § 929(a).

Forms: Complaint, petition, or declaration—Allegation of permanent injury to property—Difference between market value immediately before and after injury. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 72.

83. *Garner v Kent Excavation, Inc.* (Ala App) 532 So 2d 1033; *Rodrian v Seiber* (5th Dist) 194 Ill App 3d 504, 141 Ill Dec 585, 551 NE2d 772; *Taylor v Hanson* (Me) 541 A2d 155; *Linder v Valero Transmission Co.* (Tex App Corpus Christi) 736 SW2d 807, writ ref n re (Oct 28, 1987) and reh of writ of error overr (Dec 2, 1987).

84. *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 252.

The trial court did not err in charging the jury that in determining damages to real property as a result of a trespass, in the form of rocks and debris ejected onto the property as a result of blasting, the cost of repair is an item for their consideration in ascertaining the difference between the fair market value of the property before the injury as opposed to its fair market value after the injury. *Garner v Kent Excavation, Inc.* (Ala App) 532 So 2d 1033.

As to the cost of restoration or repair, generally, as the measure of damages, see § 137.

Forms: Complaint, petition, or declaration—Allegation of repairable injury and permanent damage—Cost of repairs and depreciation in value. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 74.

85. *Markstrom v United States Steel Corp.*, 182 Mich App 570, 452 NW2d 820, revd on other grounds (Mich) 1991 Mich LEXIS 690.

As to the purpose of an award of damage for injury from a trespass, see § 118.

there is a total diminution in value, the plaintiff may not recover more than the preinjury value of the land.⁸⁶

§ 134. Factors in determining diminished value

Where the measure of damages in trespass cases is the difference between the value of the land before and after the trespass, the value is not determined based on the best and highest use of the property, but on the owner's desired or previous use of it.⁸⁷ Where the wrongful possessor has improved the land, the real value charged should be for the land in its previous unimproved state.⁸⁸

The measure of damages for a wilful trespass in cultivating the land of another is the fair market value of the crop thus produced.⁸⁹

A delay in the receipt of the proceeds from a pending sale of the realty and a consequent loss of interest on those proceeds, although resulting from a trespass, does not come within the measure of diminution of value.⁹⁰

§ 135. —Loss of rental or usable value

Whenever a harm to land occurs from an invasion of property rights, the elements of damage to be considered include the loss of the use of the land.⁹¹ Thus, where the trespass puts the plaintiff out of possession of the land, the measure of damages is the amount that would compensate for its use and occupation, that is, the fair rental value,⁹² or, the reasonable value of the use of the property during the time the plaintiff is deprived thereof,⁹³ or, any diminution in the rental or usable value of the property, according to how it

86. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505.

87. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

88. *Uhlhorn v Keltner* (Tenn App) 723 SW2d 131.

89. *Negley v Cowell*, 91 Iowa 256, 59 NW 48.

As to a plaintiff's right to possession of crops sown by trespasser, see 21A Am Jur 2d, Crops § 29.

90. *Kirchoff v Moulder Bros., Inc.* (Fla App D5) 391 So 2d 347.

91. *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265.

92. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Uhlhorn v Keltner* (Tenn App) 723 SW2d 131.

Damages recoverable for a trespass occasioned by the unauthorized presence of a boat in a yacht basin could include the reasonable rental value of the space occupied by the boat during the time of the unauthorized occupancy. *Anchorage Yacht Haven, Inc. v Robertson* (Fla App D4) 264 So 2d 57.

Where the defendants changed the locks on the mobile home, leased by the plaintiffs, before their lease had expired effectively denying the plaintiffs access to their possessory right, the changing of the locks was a trespass for which the trial court properly awarded plaintiffs rental value of the mobile home for the ten days they were dispossessed. *Bass v Planned Management Services, Inc.* (Utah) 761 P2d 566, 89 Utah Adv Rep 11.

■■■■ **Definition:** Rental or usable value is, in an action for damages resulting from a trespass to real property, the amount for which the property in question could have been rented on the market. 22 Am Jur 2d, Damages § 447.

As to damages, generally, for the deprivation of use of property, see 22 Am Jur 2d, Damages §§ 443 et seq.

Restatement, Torts 2d § 931, Comment b.

Forms: Complaint, petition, or declaration—Allegation of loss of use of property during repairs. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 76.

93. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Pearl v Pic Walsh Freight Co.* (Hamilton Co) 112 Ohio App 11, 15 Ohio Ops 2d 338, 168 NE2d 571; *Uhlhorn v Keltner* (Tenn App) 723 SW2d 131.

was used and zoned at the time of the injury.⁹⁴ In no event can the plaintiff recover both the value of the use of the property to him and its value to the defendant.⁹⁵

Illustration: Where the trespass is occasioned by termination of a landowner's consent to the presence of a structure which was originally placed on the land with consent, damages recoverable for such a trespass may include the reasonable rental value of the space occupied by the structure during the time of unauthorized occupancy.⁹⁶

For a wrongful ouster of the plaintiff from a portion of his land, damages may be awarded equal to the difference in the rental value of the land with and without such portion.⁹⁷ In cases where the trespass is to a portion of the property, as where the trespasser establishes a road on the plaintiff's property without acquiring the proper right of way, the reasonable rental value is the appropriate measure of damage for the trespass.⁹⁸

A defendant who has beneficially occupied the plaintiff's property may be liable for its fair rental value, even though the plaintiff was not hindered or obstructed in any use which he expected to make of the property.⁹⁹

§ 136. —Destruction of trees or shrubbery

As is generally the rule where a trespass results in a diminution of the value of real property,¹ a measure of damages for trespass to land when trees have been cut is the difference between the value of the land immediately before the trespass and its value immediately thereafter.²

94. *Salesian Soc. v Ellenville* (3d Dept) 121 App Div 2d 823, 505 NYS2d 197.

In an action for trespass, occasioned by the removal of trees from the plaintiff's property, the referee's finding that the plaintiff's property was commercial and that the loss of the trees gave rise to no damages was not clearly erroneous where three local realtors testified that the plaintiffs' property, if put on the open market, would most likely attract a commercial buyer, and where the plaintiffs presented no contradictory evidence. *Taylor v Hanson* (Me) 541 A2d 155.

Although the evidence amply supported the determination of the trial court that defendants' placement of a cottage on property near the boundary line of the plaintiff's property constituted a trespass, an award of \$38,000 for lost rental income representing the total alleged rental value of plaintiffs' lot for the summers of 1979 and 1980 was not supported by the testimony of a real estate broker that although he had rented the property to a reknowned actor for the summers of 1976 and 1978, the subsequent erection of a cottage in close proximity thereto had destroyed the privacy and the broker was unable to find a tenant thereafter. *Malerba v Warren* (2d Dept) 96 App Div 2d 529, 464 NYS2d 835.

95. *Barker v Publishers' Paper Co.*, 78 NH 571, 103 A 757.

96. *Anchorage Yacht Haven, Inc. v Robertson* (Fla App D4) 264 So 2d 57.

For discussion of termination of consent, generally, see § 91.

As to trespass by failure to remove a thing from the plaintiff's land upon termination of consent, see § 52.

97. *Irwin v Nolde*, 176 Pa 594, 35 A 217.

98. *Hammond v County of Madera* (CA9 Cal) 859 F2d 797.

99. *Baltimore & O. R. Co. v Boyd*, 67 Md 32, 10 A 315; *Pearl v Pic Walsh Freight Co.* (Hamilton Co) 112 Ohio App 11, 15 Ohio Ops 2d 338, 168 NE2d 571.

1. § 133.

2. *Ex parte Broadway* (Ala) 351 So 2d 1378; *Hogan v Alabama Power Co.* (Ala App) 351 So 2d 1378, cert den (Ala) 351 So 2d 1388.

The proper measure of damages for injury to realty by the removal of trees which have no stumpage value is the diminution in the value of the land. *Miloszar v Gonzalez* (Tex Civ App Corpus Christi) 619 SW2d 283.

For discussion of the measure of damages for injury to ornamental trees and shrubs, see 22 Am Jur 2d, Damages § 424.

As to damages for the destruction of trees, generally, see 52 Am Jur 2d, Logs and Timber §§ 125 et seq.

Factors the jury may properly be instructed to consider, in determining the diminished value of plaintiffs' property as result of the defendant's trespass and the cutting of trees of various kinds and sizes, include the purpose for which the particular trees were grown and maintained; the cost of replacement or restoration to the same extent that is reasonable and practicable; and, the contemplated use of the particular lands from which the trees were cut or removed, including any aesthetic value to the landowners of such trees.³ For example, where mature orange trees in a grove were lost due to a lack of irrigation water, and the court determined it was unlikely that sufficient irrigation water would be available in the future, the diminution in the value of the land was the proper measure of damages for the destruction of trees, since the grove could not be replaced and the restoration rule could not be applied.⁴

Under some circumstances, the general rule for assessing damages does not wholly compensate the owner and a judicially recognized exception has been established which, under certain conditions, will permit the recovery of damages for loss of intrinsic value of the trees.⁵ Thus, the proper measure of damages for the wrongful destruction of ornamental or shade trees, which did not decrease the market value of the land, is the intrinsic value of the trees removed.⁶ But, in an action by a landowner against a land-clearing contractor to recover damages for the removal of trees and other vegetation from the land without the landowner's consent, where such vegetation was indigenous cacti and shrubs without intrinsic values, the proper measure of damages was the cost of restoring the land to its former condition.⁷

(3) COST OF RESTORATION OR REPAIR [§§ 137, 138]

§ 137. Generally

The cost of restoring the property to its condition prior to the injury caused by a trespass is an alternative to the measure of diminution of market value,⁸

Practice References: G. A. Marsh, *Liability for the wrongful cutting or destruction of timber*, 11 J Agric Tax'n & L 215-36 (Fall 1989).

3. *Harper v Morris*, 89 NC App 145, 365 SE2d 176, review den 322 NC 479, 370 SE2d 223.

In appropriate circumstances, damages may include a feasible and reasonable cost of restoring trees destroyed by a trespasser. *Lamb v Euclid Ambler Associates (Me)* 563 A2d 365.

Annotations: Measure of damages for destruction of or injury to fruit, nut, or other productive trees, 90 ALR3d 800.

Forms: Jury instruction—Measure of damages—Original condition restorable—Cost of repairs. 8 Am Jur Pl & Pr Forms (Rev), Damages, Forms 281, 282.

4. *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

For discussion of the measure of damages for injury to fruit and nut bearing trees, generally, see 22 Am Jur 2d, Damages § 425.

5. *Miloszar v Gonzalez* (Tex Civ App Corpus Christi) 619 SW2d 283.

6. *Shearer's, Inc. v Lyall* (Tex App Houston (14th Dist)) 717 SW2d 128.

There was no error in the trial court's acceptance of an expert forester's testimony and valuation of limbs, removed from the plaintiff's prized pecan trees by the defendant, to be \$120 per cord as firewood where the award of \$117.36 properly represented the value of the tree limbs. *Harkness v Porter* (La App 2d Cir) 521 So 2d 832, cert den (La) 523 So 2d 1323.

7. § 138.

8. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857; *Lamb v Euclid Ambler Associates (Me)* 563 A2d 365; *Kirkbride v Lisbon Contractors, Inc.*, 385 Pa Super 292, 560 A2d 809.

The trial court, in a bench trial, properly awarded the plaintiffs in an action for trespass,

where the injury to the land resulting from a trespass is temporary and subject to restoration,⁹ unless such cost is equal to¹⁰ or exceeds the market value of the affected property,¹¹ or is disproportionate to¹² or greater than the diminution in value of the property.¹³ Damages for restoration or replacement are limited to situations where replacement or restoration costs are feasible and reasonable.¹⁴ However, it also is stated that, with regard to remedial damage for trespass to realty, the plaintiff may recover only the cost of repair or restoration without regard to the diminution in the value of the property.¹⁵

Where the trespass is occasioned by termination of a landowner's consent to the presence of a structure, chattel or other thing which was originally placed on the land with the consent of the landowner, damages recoverable for such a trespass may include the reasonable cost of removing the structure or chattel.¹⁶

Definition: When injury to property is remedial by restoration or repair, it is considered to be temporary.¹⁷

Practice guide: The reasonable cost of restoration or repair must be shown by admissible evidence of probative force; the opinion of the plaintiff landowner, as to the cost of restoration, is inadmissible unless he is qualified as an expert.¹⁸

Distinction: A property owner is competent to testify as to the market value of his property; however, the law does not contemplate that an owner may give an unsupported opinion as to only the amount of decrease in value.¹⁹

§ 138. Significance of uniqueness of land

Inquiries as to the value or the costs for necessary repairs to real property are usually confined to the time of the trespass, and the locality where it occurred.²⁰

damages of \$518 for the destruction of at least two orange trees, notwithstanding the presentation of testimony by the plaintiff's expert that some seven trees had been destroyed with a replacement cost of approximately \$3,500 plus installation cost for those trees, where conflicting expert testimony existed to the effect that the replacements could be obtained without cost and that the cost of replanting them would be approximately \$75 to \$150 each. *Dessen v Jones* (4th Dist) 194 Ill App 3d 869, 141 Ill Dec 595, 551 NE2d 782.

Restatement, Torts 2d § 929(1)(a).

Forms: Complaint, petition, or declaration—Allegation of repairable injury to property. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 71.

9. *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008; *Denke v Mamola* (SD) 437 NW2d 205.

10. *Kirkbride v Lisbon Contractors, Inc.*, 385 Pa Super 292, 560 A2d 809.

11. *Harper v Morris*, 89 NC App 145, 365

SE2d 176, review den 322 NC 479, 370 SE2d 223; *Kirkbride v Lisbon Contractors, Inc.*, 385 Pa Super 292, 560 A2d 809.

12. Restatement, Torts 2d § 929, Comment b.

13. *Denke v Mamola* (SD) 437 NW2d 205.

For discussion of the cost of repairs as a measure of damages, generally, see 22 Am Jur 2d, Damages §§ 432 et seq.

14. *Lamb v Euclid Ambler Associates (Me)* 563 A2d 365.

15. *Kirkbride v Lisbon Contractors, Inc.*, 385 Pa Super 292, 560 A2d 809.

16. *Anchorage Yacht Haven, Inc. v Robertson* (Fla App D4) 264 So 2d 57.

17. § 129.

18. *Uvalde County v Barrier* (Tex App San Antonio) 710 SW2d 740.

19. § 157.

20. *Moore v Rotello* (Tex App Houston (14th Dist)) 719 SW2d 372, writ ref n re (Jan 21,

While an award of the costs of restoration of property to its original condition may be an appropriate consideration in trespass cases where the property destroyed had a unique value of its own, it is not proper where there is no evidence that the affected property had any special value to the plaintiff.²¹ For instance, plaintiffs cannot recover damages based on the cost of replacing trees, cleared from a town roadway abutting the plaintiffs' property, which they had no right to replace.²²

C. DAMAGE TO, LOSS OF USE OR DESTRUCTION OF, CHATTEL [§§ 139, 140]

§ 139. Generally; diminution in value

Plaintiffs are entitled to recover for the loss of personal property if the loss is proximately caused by a trespass.²³

|||| Practice guide: When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for:

- The difference between the value of the chattel before the harm, or at his election in the appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs.
- The loss of use.²⁴

The measure for damage to chattel, or personal property from trespass, is the same as for a trespass to real property, that is, the difference between the fair market value of the property before the injury and the fair market value of the property after the injury.²⁵ If the plaintiff is entirely deprived of his chattel, the measure of damages is usually the value of the property at the time of the trespass.²⁶ Where the property is merely damaged, the measure of damages is the actual loss sustained.²⁷ The cost of necessary repair in evidentiary factor which a jury may consider in determining the proper measure of damages for the trespass.²⁸

1987) and reh'g of writ of error overr (Feb 25, 1987).

For discussion of the measure of damages, generally, with respect to property of particular value to its owner, see 22 Am Jur 2d, Damages §§ 437 et seq.

21. *Miloszar v Gonzalez* (Tex Civ App Corpus Christi) 619 SW2d 283.

22. *Lamb v Euclid Ambler Associates (Me)* 563 A2d 365.

23. *Borland v Sanders Lead Co. (Ala)* 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

As to the measure of damages, generally, for damage to or the destruction of personal property, see 22 Am Jur 2d, Damages §§ 445, 446.

24. 22 Am Jur 2d, Damages § 427.

25. *Garner v Kent Excavation, Inc. (Ala App)* 532 So 2d 1033.

As to the general rule for measuring the damages for the taking, damaging, or destruc-

tion of personal property, see 22 Am Jur 2d, Damages § 427.

Forms: Complaint, petition, or declaration—Allegation of permanent injury to property—Difference between market value immediately before and after injury. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 72.

26. *North v Peters*, 138 US 271, 34 L Ed 936, 11 S Ct 346; *Conard v Pacific Ins. Co.*, 31 US 262, 8 L Ed 392; *Kelley v Schuyler*, 20 RI 432, 39 A 893.

27. *Harker v Dement* (Md) 9 Gill 7; *Gulf, C. & S.F.R. Co. v Johnson*, 71 Tex 619, 9 SW 602.

Forms: Jury instruction—Measure of damages—Methods of computing—Original condition restorable—Reasonable value of repairs. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 263.

28. *Garner v Kent Excavation, Inc. (Ala App)* 532 So 2d 1033.

Forms: Complaint, petition, or declaration—

|||| Comment: Ordinarily, in the case of damage by trespass to a chattel, it is not prudent to assume that repairs would be made if the cost of repairs would be materially greater than the value of the chattel before the harm; however, if the chattel has peculiar value, such as a family portrait having substantial value, or there would be a serious delay or inconvenience in obtaining a substitute, it may be reasonable to make repairs at an expense greater than the replacement of the chattel.²⁹

§ 140. Loss of use; time

The actual cost of the thing injured or destroyed is not always the measure of damages in cases of trespasses to chattel.³⁰ Compensation for all incidental damages which are the natural and proximate result of the trespass charged also may be recovered.³¹

|||| Comment: In addition to damages for the diminution of the value of the subject matter, or other similar elements of damages to a chattel, the plaintiff is entitled to recover for any loss of which the defendant's act is the legal cause, either because the plaintiff is unable to use the thing until it is repaired or replaced, or otherwise.³²

The whole loss sustained is to be taken into view, and this depends on the uses of the personalty in question, its profits, the particular time when the injury was done, and the benefits or advantages lost thereby.³³ The owner of the chattel is entitled to recover, as damages for the loss of the value of its use, at least the rental value of the chattel during the period of the deprivation; this is true even where the owner suffers no harm through the deprivation of the chattel, as when he was not using it or where he had a substitute that was used without any expense to him.³⁴

Loss of time occasioned to the owner of a chattel by reason of its destruction cannot be considered in estimating the damage resulting from the loss of the property, except in unusual circumstances, as where the plaintiff is unable to perform his work or a contract without the use of the property.³⁵

Allegation of loss of use of property during repairs. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 76.

Jury instruction—Measure of damages—Methods of computing—Original condition restorable—Reasonable value of repairs. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 263.

—Cost of repairs and loss of use. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 264.

29. Restatement, Torts 2d § 928, Comment a.

30. Woolley v Carter, 7 NJL 85; Post v Munn, 4 NJL 61.

Forms: Complaint, petition, or declaration—Allegation of total destruction of property—Fair market value at time of destruction. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 73.

31. Weston v Dorr, 25 Me 176.

As to consequential damages, generally, arising from a trespass, see §§ 142 et seq.

32. Restatement, Torts 2d § 928, Comment b.

33. Post v Munn, 4 NJL 61.

Forms: Complaint, petition, or declaration—Allegation of injury to property interfering with conduct of plaintiff's business—Loss of profits. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 79.

34. Restatement, Torts 2d § 931, Comment b.

35. Ford Motor Co. v Bradley Transp. Co. (CA6 Mich) 174 F2d 192.

Law Review: Note, Loss of Use Damages for Injuries to Interests in Commercial Chattels. 15 For Urb LJ 235, 1986-87.

Forms: Complaint, petition, or declaration—Allegation of injury to property interfering with conduct of plaintiff's business—Loss of profits. 8 Am Jur Pl & Pr Forms (Rev), Damages, Form 79.

3. PARTICULAR TYPES OR ELEMENTS OF DAMAGES FOR TRESPASS [§§ 141-156]

a. ACTUAL AND NOMINAL DAMAGES [§ 141]

§ 141. Generally

In an action of trespass, the prevailing plaintiff is ordinarily entitled to an amount which will compensate him for actual damages sustained³⁶ as a direct result of the act of trespass, even though the damages were not sustained until some time after the act of trespass was committed.³⁷ Actual damages, sometimes called compensatory damages, are the damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him.³⁸

A prevailing plaintiff in an action for trespass to real property is always entitled at least to nominal damages,³⁹ even in the absence of proof of injury and where the plaintiff is benefited by the trespass.⁴⁰ In an action seeking the recovery of damages for injuries to realty by innocent trespassers, the underlying purpose of the court is to compensate the owner for the injury received;⁴¹ and, even the most innocent of trespassers is liable for nominal damages at a minimum.⁴²

Definition: Nominal damages are those damages recoverable either where a legal right is to be vindicated against a trespass that has produced no actual present loss of any kind or where, from the nature of the case, some compensable injury has been shown but the amount of the injury has not been proved. For example, nominal damages have been defined as a trivial sum such as one cent or one dollar awarded to a plaintiff whose legal right has been invaded but who has failed to prove any compensatory damages.⁴³

Distinction: Nominal damages are to be distinguished from compensatory damages on the one hand and from punitive damages on the other, in that they are granted irrespective of harm to the plaintiff or of a bad state of mind on the part of the defendant; they are intended neither to compensate the plaintiff nor to punish the trespasser.⁴⁴

One who intentionally enters land in the possession of another is subject to liability even in the absence of harm.⁴⁵ On the other hand, one who trespasses unintentionally and negligently is not liable in damages, even though the entry causes harm,⁴⁶ except when engaged in an abnormally dangerous activity.⁴⁷

36. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

37. *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

38. 22 Am Jur 2d, Damages § 24.

39. *Longenecker v Zimmerman*, 175 Kan 719, 267 P2d 543; *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832; *Lake Mille Lacs Invest., Inc. v Payne* (Minn App) 401 NW2d 387; *Fairfield Commons Condominium Asso. v Stasa* (Lucas Co) 30 Ohio App 3d 11, 30 Ohio BR 49, 506 NE2d 237, cert den 479 US 1055, 93 L Ed 2d 981, 107 S Ct 930; *Hawkins v Schroeter* (Tex Civ App) 212 SW2d 843; *Jacobs v Major*, 139 Wis 2d 492, 407 NW2d 832.

40. § 161.

41. *Miloszar v Gonzalez* (Tex Civ App Corpus Christi) 619 SW2d 283.

42. *Rossi v Ventresca Bros. Constr. Co.*, 94 Misc 2d 756, 405 NYS2d 375.

43. *Henderson v For-Shor Co.* (Utah App) 757 P2d 465, 84 Utah Adv Rep 42.

Restatement, Torts 2d § 907.

44. Restatement, Torts 2d § 907, Comment a.

45. § 27.

46. § 30.

47. § 12.

b. CONSEQUENTIAL DAMAGES [§§ 142–147]

§ 142. Generally

One who tortiously harms the person or property of another is subject to liability for damages for the consequences of the harm, in accordance with the rules on whether the conduct is a legal cause of the consequences.⁴⁸ Thus, a trespasser is responsible in damages for all injurious consequences flowing from his trespass which are the natural and proximate result of his conduct,⁴⁹ including all direct consequences of any conduct engaged in while trespassing, as well as the indirect consequences, some of which may not have been reasonably foreseeable.⁵⁰

|||| Practice guide: A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land at the time of the trespass, or to the land or to his things, or to members of his household or to their things, caused by any act done, activity carried on, or condition created by the trespasser, irrespective of whether his conduct is such as would subject him to liability were he not a trespasser.⁵¹

§ 143. Injuries to persons

A trespasser is generally considered liable for all personal injuries to a landowner resulting directly or naturally from his trespass.⁵² If injury or damage to a property owner or to a member of his household results primarily and directly from the act of a trespass, the trespasser is liable therefor even though his act is not negligent or willful.⁵³ However, a trespass to land does not make the trespasser an insurer of the landowner or members of his household for injuries or damages which may be a secondary, indirect, or consequential result of his trespass.⁵⁴ If the owner or possessor of the land, wilfully, voluntarily, or by negligence, himself brings about the injury to his person, such an injury cannot be said to be consequent upon the trespass to the land, and in that event the trespasser would not be liable therefor.⁵⁵

When a trespass causes bodily harm or emotional distress, the law cannot restore the person to his previous position; nonetheless, such damages are called compensatory because they attempt to give the injured person some

48. 22 Am Jur 2d, Damages § 399.

49. *Wilson v Haley Live Stock Co.*, 153 US 39, 38 L Ed 627, 14 S Ct 768; *McAfee v Crofford*, 54 US 447, 14 L Ed 217; *Hughett v Caldwell County*, 313 Ky 85, 230 SW2d 92, 21 ALR2d 373; *Curtis v Fruin-Colnon Contracting Co.*, 363 Mo 676, 253 SW2d 158; *Taylor v Kaufhold*, 368 Pa 538, 84 A2d 347, 32 ALR2d 575.

50. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

For discussion of particular types of injuries to persons consequential to acts of trespass, see §§ 143 et seq.

51. Restatement, Torts 2d § 162.

52. *Engle v Simmons*, 148 Ala 92, 41 So 1023; *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027; *Lesch v Great Northern R. Co.*, 97 Minn 503, 106 NW 955; *Kopka v Bell Tel. Co.*, 371 Pa 444, 91 A2d 232.

53. *Connolley v Omaha Public Power Dist.*, 185 Neb 501, 177 NW2d 492.

As to intent, generally, as an element of trespass, see §§ 9 et seq.

54. *Connolley v Omaha Public Power Dist.*, 185 Neb 501, 177 NW2d 492.

55. *Kopka v Bell Tel. Co.*, 371 Pa 444, 91 A2d 232.

pecuniary return for he has suffered or is likely to suffer.⁵⁶ The length of time during which pain or other harm to the feelings has been or probably will be experienced, and the intensity of the distress, are factors to be considered in assessing the measure of recovery; in determining this, all relevant circumstances are considered, including sex, age, condition in life, and any other fact indicating the susceptibility of the injured person to this type of harm.⁵⁷

§ 144. —Physical injury

Among the damages recoverable for a trespass upon real property are those for physical injury to the owner or his family.⁵⁸

■■■■ *Reminder:* When a trespass causes bodily harm, the law cannot restore the person to his previous position; nonetheless, such damages are called compensatory because they attempt to give the injured person some pecuniary return for he has suffered or is likely to suffer.⁵⁹

Ill health and physical disability suffered by the plaintiff may be the natural and probable consequences of a trespass by the defendant as to subject him to liability therefor.⁶⁰ However, an injury received by falling from exhaustion while pursuing a trespasser, in order to reclaim personal property wrongfully taken away by him, is not the proximate result of the trespass so as to warrant recovery therefor.⁶¹

§ 145. —Mental and emotional injury

If a trespass causes mental distress, the trespasser is liable in damages for the mental distress and for any resulting harm.⁶² Anguish,⁶³ anxiety,⁶⁴ humilia-

56. Restatement, Torts 2d § 903, Comment a.

57. Restatement, Torts 2d § 905, Comment i.

58. *OB-GYN Associates of Albany v Littleton*, 259 Ga 663, 386 SE2d 146, on remand 194 Ga App 787, 391 SE2d 806, later app (Ga App) 102-51 Fulton County D R 10B.

59. § 142.

As to the general rule that a trespasser is liable in damages for any resulting illness or physical harm to the plaintiff, resulting from the trespass, see 38 Am Jur 2d, Fright, Shock, and Mental Disturbance § 30.

60. *Hammond v County of Madera* (CA9 Cal) 859 F2d 797; *Hatchell v Kimbrough*, 49 NC 163.

61. *Clifford v Metropolitan Life Ins. Co.*, 197 Ky 828, 248 SW 180, 32 ALR 919.

62. *Hammond v County of Madera* (CA9 Cal) 859 F2d 797.

Mental injury flowing from a trespass is compensable since a trespass upon real property imposes liability for damage caused to the property and person, including mental injury to the owner and his family. *OB-GYN Associates of Albany v Littleton*, 259 Ga 663, 386 SE2d 146, on remand 194 Ga App 787, 391 SE2d 806, later app (Ga App) 102-51 Fulton County D R 10B.

■■■■ *Reminder:* When a trespass causes bodily emotional distress, the law cannot restore the person to his previous position; nonetheless, such damages are called compensatory because they attempt to give the injured person some pecuniary return for he has suffered or is likely to suffer. § 142.

63. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Owens v Smith* (La App 2d Cir) 541 So 2d 950.

Where a television broadcast company, without the consent of the plaintiff, entered her home with paramedics and filmed their attempts to resuscitate her husband and them subsequently broadcast the film without consent, there was an intentional trespass, and the "consequences, which resulted therefrom would include the plaintiff wife's anguish and her emotional distress in viewing the broadcast of her husband's dying moments. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

A plaintiff was entitled to an award of \$1,250 for mental anguish resulting from a neighbor's trespass in having the limbs of pecan trees on the plaintiff's property pruned, where the plaintiff testified that her grandfather had planted the trees 60 years before, her father had meticulously cared for and harvested the pecan

tion, embarrassment,⁶⁵ distress,⁶⁶ discomfort, and annoyance are appropriate considerations in an award of damages for injuries resulting from a trespass.⁶⁷ For instance, damages from mental suffering are recoverable if the trespass was committed under circumstances of insult, rude language or treatment, haughtiness, and contempt.⁶⁸ Where one intentionally injures the personal property of another, or wrongfully takes it from the owner, the trespasser is liable for the mental distress which the owner suffers as a consequence of witnessing or learning of the wrongdoing.⁶⁹

■■■■ **Caution:** Under the law of some jurisdictions, the consequences flowing from an intentional tort such as a trespass may include emotional distress even without a physical injury to the person or to the land.⁷⁰

§ 146. Interest

In trespass actions involving the destruction of or injury to property, interest is allowed⁷¹ from the time of the trespass.⁷² Although some jurisdic-

trees, and where the plaintiff's father had passed away only 8 months before the limbs were cut, causing particular mental anguish to the plaintiff who obviously attached significance to the trees because of her father's feelings and care for them. *Harkness v Porter* (La App 2d Cir) 521 So 2d 832, cert den (La) 523 So 2d 1323.

Practice References: D. McLean, Recognizing the reporter's right to trespass, 9 Com. & L. 31-42 (October 1987).

64. Restatement, Torts 2d § 905, Comment e.

65. *Owens v Smith* (La App 2d Cir) 541 So 2d 950.

■■■■ **Comment:** One who has a cause of action for trespass may be entitled to recover as an element of damages for that form of mental distress known as humiliation, that is, a feeling of degradation or inferiority, of a feeling of being regarded with aversion and dislike. Restatement, Torts 2d § 905, Comment d.

66. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505.

67. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265.

As to recovery for humiliation, indignity, insult, and the like, generally, see 38 Am Jur 2d, Fright, Shock, and Mental Disturbance § 53.

Restatement, Torts 2d § 929(c).

68. *Ex parte SouthTrust Bank of Alabama, N.A.* (Ala) 523 So 2d 407, on remand (Ala App) 523 So 2d 413.

As to consequential damages for injuries to persons resulting from trespass, see § 143.

69. 38 Am Jur 2d, Fright, Shock, and Mental Disturbance § 32.

70. *Miller v National Broadcasting Co.* (2nd Dist) 187 Cal App 3d 1463, 232 Cal Rptr 668, 69 ALR4th 1027.

71. *District of Columbia v Robinson*, 180 US 92, 45 L Ed 440, 21 S Ct 283; *Matanuska Electric Assn. v Weissler* (Alaska) 723 P2d 600; *Jacksonville, T. & K.W.R. Co. v Peninsular Land, Transp. & Mfg. Co.*, 27 Fla 1, 9 So 661, reh den 27 Fla 157, 9 So 689; *Collins v Gleason Coal Co.*, 140 Iowa 114, 115 NW 497, reh overr 140 Iowa 123, 118 NW 36; *Freidenheit v Edmundson*, 36 Mo 226; *Adams v Blodgett*, 47 NH 219; *White v Miller*, 78 NY 393.

For discussion on interest as an element of damages in tort actions, generally, see 22 Am Jur 2d, Damages § 648; as to allowance of prejudgment interest in actions for injury to personal property, see 22 Am Jur 2d, Damages § 671.

Annotation: Interest on damages for period before judgment for injury to, or detention loss, or destruction of, property, 36 ALR2d 337.

72. *McConnell Bros. v Slappey*, 134 Ga 95, 67 SE 440; *Janeway v Burton*, 201 Ill 78, 66 NE 337; *Collins v Gleason Coal Co.*, 140 Iowa 114, 115 NW 497, reh overr 140 Iowa 123, 118 NW 36; *Gates v Comstock*, 113 Mich 127, 71 NW 515; *Hopple v Higbee*, 23 NJL 342; *Bayer v Airlift International, Inc.*, 111 NJ Super 461, 268 A2d 548; *Torrans v Tri-State Iron & Metal Co.* (Tex Civ App Texarkana) 381 SW2d 668; *Mayflower Invest. Co. v Stephens* (Tex Civ App Dallas) 345 SW2d 786, writ ref n r e; *Anderson v Sloane*, 72 Wis 566, 40 NW 214.

tions hold that interest may be recovered as a matter of right,⁷³ in others the allowance of interest is held to rest in the discretion of the jury, and not to be a matter of legal right.⁷⁴

Prejudgment interest may be awarded on the compensatory portion of a treble damages award for a trespass, but not on the punitive portion of the award.⁷⁵

§ 147. —Incidental expenses; litigation fees and costs

Although a trespasser is responsible in damages for all injurious direct and indirect consequences flowing from his trespass which are the natural and proximate result of the conduct,⁷⁶ expenses incurred by the property owner in having the destroyed trees removed are not recoverable, where the applicable measure of damages for trespass to real property is the difference in the value of the property before and after the trespass or the value of the trees destroyed.⁷⁷

The owner of a yacht basin could recover, for a trespass occasioned by the unauthorized presence of a boat in the basin, the reasonable expenses incurred in removing the boat.⁷⁸

The plaintiff cannot recover for his trouble in ascertaining the persons who invaded his rights.⁷⁹ However, where plaintiffs prevailed on the issue of liability for trespass, although they failed to demonstrate compensatory damages and thus were not entitled to the jury's award of punitive damages, their recovery of judgment was sufficient to entitle them to an award of costs apportioned between the two defendants in the discretion of the trial court.⁸⁰ In this regard, the damages in a trespass action do not ordinarily include compensation for attorney fees or other expenses of litigation,⁸¹ although attorney fees may be awarded as punitive damages.⁸²

C. PUNITIVE OR EXEMPLARY DAMAGES [§§ 148–152]

§ 148. Generally

As in any other case,⁸³ in a case of trespass, there is no right to an award of

73. *Lowery v Rowland*, 104 Ala 420, 16 So 88; *Bowman v Davis*, 13 Colo 297, 22 P 507; *Janeway v Burton*, 201 Ill 78, 66 NE 337; *Gates v Comstock*, 113 Mich 127, 71 NW 515; *Flamm v Noble*, 296 NY 262, 72 NE2d 886, 171 ALR 812; *Anderson v Sloane*, 72 Wis 566, 40 NW 214.

74. *District of Columbia v Robinson*, 180 US 92, 45 L Ed 440, 21 S Ct 283; *Mullins v Clinchfield Coal Corp.* (CA4 Va) 227 F2d 881, cert den 351 US 982, 100 L Ed 1496, 76 S Ct 1048; *Crow v State*, 23 Ark 684; *Walker v Borland*, 21 Mo 289; *Riphey v Miller*, 46 NC 479; *Conover v Bloom*, 269 Pa 548, 112 A 752.

75. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

76. § 142.

77. *Horn v Corkland Corp.* (Fla App D2) 518 So 2d 418, 13 FLW 139 (by implication).

For discussion of damages for restoration and repair, see §§ 137, 138.

As to costs and expenses, generally, for property damage, see 22 Am Jur 2d, Damages §§ 546, 548.

78. *Anchorage Yacht Haven, Inc. v Robertson* (Fla App D4) 264 So 2d 57.

79. *Longfellow v Quimby*, 29 Me 196.

80. *Horn v Corkland Corp.* (Fla App D2) 518 So 2d 418, 13 FLW 139.

81. *Restatement, Torts* 2d § 914(1).

82. § 148.

83. 22 Am Jur 2d, Damages § 739.

punitive damages.⁸⁴ they are not recoverable as a matter of law.⁸⁵ Such an award is discretionary with the court or the jury, except as expressly limited by a statute.⁸⁶ If, however, a trespass constitutes fraud or a willful, wanton, or malicious invasion of the injured party's rights, the injured party is said to be entitled to recover punitive damages.⁸⁷ Punitive, or exemplary, damages are damages other than compensatory or nominal damages, intended to punish the trespasser for outrageous conduct, and to deter him and others from similar conduct in the future.⁸⁸

§ 149. Prerequisite of actual damages

In general, actual, or compensatory, damages are a prerequisite to an award of punitive damages in an action for trespass.⁸⁹

If the intrusion to the property is direct, regardless whether or not it is intentional, actual damages need not be shown; an award of nominal damages will support punitive damages.⁹⁰

|||| Comment: Although the extent of harm suffered by a plaintiff as a result of a trespass may be considered in determining the amount of an award of punitive damages, it is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical.⁹¹

§ 150. Elements of conduct warranting punitive damages

Punitive damages may be awarded as punishment for a trespass which was deliberate,⁹² willful,⁹³ rude,⁹⁴ reckless,⁹⁵ grossly negligent, wanton,⁹⁶ malicious,⁹⁷

84. *Jochem v Kerstiens* (Ind App) 498 NE2d 1241; *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

85. *Ex parte Broadway* (Ala) 351 So 2d 1378.

86. § 152.

87. *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

88. *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; *Jochem v Kerstiens* (Ind App) 498 NE2d 1241.

Restatement, Torts 2d § 908(1).

89. *Koepnick v Sears Roebuck & Co.* (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41; *Jochem v Kerstiens* (Ind App) 498 NE2d 1241; *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832; *Lake Mille Lacs Invest., Inc. v Payne* (Minn App) 401 NW2d 387; *Kirkbride v Lisbon Contractors, Inc.*, 385 Pa Super 292, 560 A2d 809; *Ball v Overton Square, Inc.* (Tenn App) 731 SW2d 536; *Martel v Hall Oil Co.*, 36 Wyo 166, 253 P 862, 52 ALR 91, reh den 36 Wyo 187, 255 P 3, 52 ALR 102.

As to the assessment of punitive damages, the limits of discretion with respect thereto, and and review thereof, see § 152.

For discussion of actual damages as a prerequisite to recovery of punitive damages in actions, generally, see 22 Am Jur 2d, Damages §§ 743-746.

Annotations: Sufficiency of showing of actual damages to support award of punitive damages—modern cases, 40 ALR4th 11.

90. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

As to actual and nominal damages for a trespass, generally, see § 120.

91. Restatement, Torts 2d § 908, Comment c.

For discussion of the distinction, with respect to trespass, between injury and harm, see § 14.

92. *Skelton v Haney*, 116 Idaho 511, 777 P2d 733.

93. *Day v Woodworth*, 54 US 363, 14 L Ed 181; *Horn v Corkland Corp.* (Fla App D2) 518 So 2d 418, 13 FLW 139; *Skelton v Haney*, 116 Idaho 511, 777 P2d 733; *Best v Allen*, 30 Ill 30; *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; *Jochem v Kerstiens* (Ind App) 498 NE2d 1241; *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008; *Yazoo & M. V. R. Co. v Sanders*, 87 Miss 607, 40 So 163; *Bobo v State* (Tex App Hous-ton (14th Dist)) 757 SW2d 58, petition for

fraudulent,⁹⁸ or was accompanied with outrage,⁹⁹ deliberate violence,¹ or

discretionary review ref (Dec 21, 1988) and motion for rehearing on PDR denied (Jan 18, 1989) and cert den 490 US 1066, 104 L Ed 2d 631, 109 S Ct 2066; Moore v Rotello (Tex App Houston (14th Dist)) 719 SW2d 372, writ ref n re (Jan 21, 1987) and reh of writ of error overr (Feb 25, 1987).

Definition: A "willful" trespass is one which is made knowingly, intentionally, deliberately, and designedly, negating any good faith. Bobo v State (Tex App Houston (14th Dist)) 757 SW2d 58, petition for discretionary review ref (Dec 21, 1988) and motion for rehearing on PDR denied (Jan 18, 1989) and cert den 490 US 1066, 104 L Ed 2d 631, 109 S Ct 2066.

For discussion of the significance of intent to commit a trespass, generally, see §§ 9 et seq.

As to the effect of a lack of any bad faith, generally, in defense to an action for trespass, see § 74.

94. Ex parte SouthTrust Bank of Alabama, N.A. (Ala) 523 So 2d 407, on remand (Ala App) 523 So 2d 413; Davidson v Hester (Ala App) 535 So 2d 170.

95. Davidson v Hester (Ala App) 535 So 2d 170; Armitage v Decker (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; Miller v Carnation Co., 33 Colo App 62, 516 P2d 661.

As to trespass involving reckless and negligent conduct, generally, see § 12.

96. Day v Woodworth, 54 US 363, 14 L Ed 181; Ex parte SouthTrust Bank of Alabama, N.A. (Ala) 523 So 2d 407, on remand (Ala App) 523 So 2d 413; Miller v Carnation Co., 33 Colo App 62, 516 P2d 661 (wanton disregard); Horn v Corkland Corp. (Fla App D2) 518 So 2d 418, 13 FLW 139 (wanton misconduct); Ingram v Summerlin, 179 Ga App 832, 348 SE2d 68 (wanton); Statler v Catalano (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; Jochem v Kerstiens (Ind App) 498 NE2d 1241; R & S Dev., Inc. v Wilson (Miss) 534 So 2d 1008.

Definition: Whether a particular course of conduct or a failure to act constitutes a "wanton" disregard of plaintiffs' rights such to warrant exemplary damages, is a question for the jury to determine. Miller v Carnation Co., 33 Colo App 62, 516 P2d 661 (for instance, where a defendant despite repeated complaint by plaintiffs over a period of 5 years failed to take the action which would clearly remedy the trespass).

The evidence supported punitive damages jury award in a trespass action against oil

company which, after minimal title check of property in the area, went on the land, without the owner's permission, to conduct seismic exploration, and damaged or destroyed several hundred trees, brought in heavy machinery, and made roads in a meandering or weaving fashion. Shell Oil Co. v Murrah (Miss) 493 So 2d 1274.

97. Ex parte SouthTrust Bank of Alabama, N.A. (Ala) 523 So 2d 407, on remand (Ala App) 523 So 2d 413; Matanuska Electric Asso. v Weissler (Alaska) 723 P2d 600; Armitage v Decker (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; Ingram v Summerlin, 179 Ga App 832, 348 SE2d 68; Skelton v Haney, 116 Idaho 511, 777 P2d 733; Statler v Catalano (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; Jochem v Kerstiens (Ind App) 498 NE2d 1241; Moore v Rotello (Tex App Houston (14th Dist)) 719 SW2d 372, writ ref n re (Jan 21, 1987) and reh of writ of error overr (Feb 25, 1987).

A court may only award punitive damages for intentional conduct that is malicious; thus, where plaintiffs have alleged that defendants knowingly and maliciously dumped hazardous waste on their property, they have properly plead a claim for punitive damages. Regan v Cherry Corp. (DC RI) 706 F Supp 145.

Definition: "Malice" connotes conduct which is intended by the defendant to cause injury to the plaintiff, or which is carried on by the defendant with a willful and conscious disregard for the rights or safety of others. Armitage v Decker (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505.

98. Ex parte SouthTrust Bank of Alabama, N.A. (Ala) 523 So 2d 407, on remand (Ala App) 523 So 2d 413; Armitage v Decker (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; Merriells v Tariff Mfg. Co., 10 Conn 384; Ingram v Summerlin, 179 Ga App 832, 348 SE2d 68; Statler v Catalano (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; Jochem v Kerstiens (Ind App) 498 NE2d 1241.

99. Day v Woodworth, 54 US 363, 14 L Ed 181.

1. Statler v Catalano (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; International & G.N.R. Co. v Telephone & Tel. Co., 69 Tex 277, 5 SW 517.

oppression,² or other aggravating circumstances.³ A trespass is accompanied by aggravating circumstances whenever willfulness, wantonness, malice, or oppression are elements of the act.⁴ In the absence of such elements, no ground exists for an award of punitive damages.⁵

§ 151. —Conduct attributable to human failing distinguished

The conduct sufficient to warrant an award of punitive damages must be inconsistent with a hypothesis of mere negligence, mistake of law or fact, overzealousness, or other human failing.⁶ Exemplary or punitive damages may not be recovered where it appears that the defendant acted in a good faith belief that he was exercising his right,⁷ or under a mistake,⁸ without willful and wanton misconduct,⁹ malice,¹⁰ or wrongful intent.¹¹ A trespass upon real property made under a mistake as to the right of the trespasser, in good faith, and without any element of actual malice or any circumstance of rudeness, violence, or wantonness, entitles the person injured to compensatory damages only.¹²

2. *Day v Woodworth*, 54 US 363, 14 L Ed 181; *Ex parte SouthTrust Bank of Alabama*, N.A. (Ala) 523 So 2d 407, on remand (Ala App) 523 So 2d 413; *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505; *Merrills v Tariff Mfg. Co.*, 10 Conn 384; *Ingram v Summerlin*, 179 Ga App 832, 348 SE2d 68; *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265; *Jochem v Kerstiens* (Ind App) 498 NE2d 1241.

3. *Ex parte SouthTrust Bank of Alabama*, N.A. (Ala) 523 So 2d 407, on remand (Ala App) 523 So 2d 413; *Merrills v Tariff Mfg. Co.*, 10 Conn 384; *International & G.N.R. Co. v Telephone & Tel. Co.*, 69 Tex 277, 5 SW 517.

■■■■ **Definition:** A trespass upon real property is committed is committed under circumstances of "aggravation," where the trespasser knows that he is acting wrongfully, and the trespass is accompanied by violence, insult, use of excessive force, reckless disregard of the rights of others, or personal injury to the one in possession. *International & G.N.R. Co. v Telephone & Tel. Co.*, 69 Tex 277, 5 SW 517.

4. *Rodrian v Seiber* (5th Dist) 194 Ill App 3d 504, 141 Ill Dec 585, 551 NE2d 772.

A trespass which, notwithstanding mitigating facts, is a resort to physical force in defiance of law, with risk to life and property, is ground for exemplary damages. *McAfee v Crofford*, 54 US 447, 14 L Ed 217.

Where the trial court found that the defendant acted in an improper and unacceptable manner by repeatedly trespassing on the plaintiffs' land, destroying their crops and fence, and verbally threatening and abusing them, the evidence was sufficient to support the award of

punitive damages. *Jochem v Kerstiens* (Ind App) 498 NE2d 1241.

As to trespass involving reckless and negligent conduct, generally, see § 12.

5. *Western Union Tel. Co. v Johnston* (Miss) 114 So 746.

In the absence of proof of malice or wantonness, or culpable inattention or neglect on the part of the defendant in the conduct of his business, exemplary damages cannot be recovered for a trespass committed by the defendant's employees. *Kiel v Chartiers Gas Co.*, 131 Pa 466, 19 A 78.

6. *Jochem v Kerstiens* (Ind App) 498 NE2d 1241.

7. *Moore v Rotello* (Tex App Houston (14th Dist)) 719 SW2d 372, writ ref n re (Jan 21, 1987) and reh of writ of error overr (Feb 25, 1987).

8. *Horn v Corkland Corp.* (Fla App D2) 518 So 2d 418, 13 FLW 139; *Illinois C.R. Co. v Hoskins*, 80 Miss 730, 32 So 150.

9. *Horn v Corkland Corp.* (Fla App D2) 518 So 2d 418, 13 FLW 139.

10. *Selden v Cashman*, 20 Cal 56; *La Bruno v Lawrence*, 64 NJ Super 570, 166 A2d 822, certif den 34 NJ 323, 168 A2d 694.

11. *Moore v Rotello* (Tex App Houston (14th Dist)) 719 SW2d 372, writ ref n re (Jan 21, 1987) and reh of writ of error overr (Feb 25, 1987).

12. *Kiel v Chartiers Gas Co.*, 131 Pa 466, 19 A 78.

Annotations: Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 ALR3d 1016.

■■■■ Observation: An act which, as related to the true owner of land, might appear to be a trespass is not in fact a trespass if the act is committed in good faith by one who actually and sincerely believes that he is authorized to do the act in question.¹³

§ 152. Assessment of damages

The assessment of punitive damages for trespass is a matter within the discretion of the trier of fact, that is, the court¹⁴ or the jury.¹⁵

An award of punitive damages in a trespass action must bear a reasonable relationship to the amount awarded as compensatory damages.¹⁶ A test for awarding punitive damages, which provides that the punishment to a defendant and its deterrent effect on society must be related to the nature and extent of the plaintiff's injuries, enables the court to temper the amount of punitive damages awarded yet insure that justice is served.¹⁷ Uncertainty as to the amount, and arguably as to the allocation, of an award of punitive damages against joint tortfeasors in trespass will not preclude the plaintiff's right to recover.¹⁸

In determining the amount of punitive damages warranted by a trespass, as well as in deciding whether they should be given at all, the trier of fact can properly consider not merely the act itself but all the circumstances, including the motives of the wrongdoer, the relations between the parties, and the provocation or want of provocation for the act.¹⁹ The extent of harm suffered by a plaintiff as a result of a trespass may be considered in determining the amount of an award of punitive damages, although it is not essential.²⁰

A reviewing court will not reduce the amount of punitive damages awarded unless the award is clearly excessive,²¹ or, if the entire record, when viewed most favorably to the judgment, indicates that the judgment was rendered as a result of passion and prejudice.²²

13. § 105.

14. *Jochem v Kerstiens* (Ind App) 498 NE2d 1241.

■■■■ Distinction: In an action for statutory damages for the destruction of trees located on plaintiffs' property, it was improper to direct the jury to insert treble damages if they made a finding of trespass against any defendant, since it was for the court to grant judgment for treble damages for violation of the applicable statute. § 156.

15. *Ex parte Broadway* (Ala) 351 So 2d 1378 (the failure of the trial court to leave the assessment of punitive damages entirely to the discretion of the jury is reversible error); *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265.

As to punitive, or exemplary, damages, generally, in trespass actions, see §§ 148 et seq.

Annotations: Propriety and effect of jury's apportionment of damages as between tortfeasors jointly and severally liable, 46 ALR3d 801.

Apportionment of punitive or exemplary

damages as between joint tortfeasors, 20 ALR3d 666.

16. *Kirkbride v Lisbon Contractors, Inc.*, 385 Pa Super 292, 560 A2d 809.

17. *Kirkbride v Lisbon Contractors, Inc.*, 385 Pa Super 292, 560 A2d 809.

18. *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008.

19. *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265.

20. § 149.

As to statutory damages for trespass, generally, see §§ 153 et seq.

21. *Wilson v Dukona Corp., N.V.* (Ala) 547 So 2d 70 (by implication); *Statler v Catalano* (5th Dist) 167 Ill App 3d 397, 118 Ill Dec 283, 521 NE2d 565, app den 122 Ill 2d 595, 125 Ill Dec 237, 530 NE2d 265.

22. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505.

Practice guide: In a case seeking compensatory and punitive damages for the wrongful cutting of timber, where the excessiveness of a jury verdict awarding compensatory and punitive damages is an issue, the focus is on the plaintiff with regard to the propriety of the compensatory damages award, and on the defendant with respect to the propriety of any assessment of punitive damages.²³

Factors relied upon by the courts to guide review of punitive damage awards include the nature of the defendant's acts in light of the whole record, the amount of compensatory damages, and the wealth of the defendant.²⁴ In assessing punitive damages, the jury is not allowed to consider the financial position of the defendant, although such is a consideration essential to a postjudgment critique of a punitive damages award, inasmuch as the proper amount of punitive damages for a trespass of property must not exceed an amount that will accomplish society's goals of punishment and deterrence.²⁵

Observation: Although damages in a trespass action do not ordinarily include compensation for attorney fees,²⁶ they may be included as part of an award of punitive damages for trespass²⁷ or where an award of punitive damages is unsuccessfully challenged on appeal.²⁸

d. STATUTORY PROVISION FOR MULTIPLE DAMAGES OR PENALTIES [§§ 153–156]

§ 153. Generally; purpose

In some jurisdictions, statutes provide for the award of multiple damages for trespasses to real property occurring under certain circumstances.²⁹ Some such statutes are intended to deter the wrongdoer from repeating the trespass.³⁰

Observation: An award of fees and costs also may be mandated in order to relieve the successful plaintiff of the costs of litigation.³¹

²³ *Wilson v Dukona Corp., N.V.* (Ala) 547 So 2d 70.

²⁴ *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505.

²⁵ *Wilson v Dukona Corp., N.V.* (Ala) 547 So 2d 70.

²⁶ § 147.

²⁷ *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008.

²⁸ *Skelton v Haney*, 116 Idaho 511, 777 P2d 733.

²⁹ *Arnold v Lee*, 296 Ark 339, 756 SW2d 904 (destruction of trees); *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857 (cutting timber); *Winslow v Merrifield* (Me) 538 A2d 283 (cutting timber); *Johnson v Jensen* (Minn) 446 NW2d 664 (destruction of trees); *Desforge v West St. Paul*, 231 Minn 205, 42 NW2d 633, 19 ALR2d 898; *Recchia v Nelson*, 127 Misc 2d 412, 485 NYS2d 963 (destruction of trees).

The court's decision to award treble damages to the plaintiff in the trespass action was proper where a statute provides that where a plaintiff is awarded any damage, he is entitled to a judgment for treble the sum so awarded unless there is an affirmative finding that the injury for which the action was brought was casual and involuntary, where the evidence was overwhelming that the injury was caused by the defendant's intentional and willful actions. *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 252.

As to statutory provisions for double or treble damages, generally, see 22 Am Jur 2d, Damages §§ 813-818.

³⁰ *National Gypsum Co. v Wammock*, 256 Ga 803, 353 SE2d 809, CCH Prod Liab Rep ¶11334, later proceeding (CA11 Ga) 826 F2d 990, CCH Prod Liab Rep ¶11535, op withdrawn on other grounds, substituted op (CA11 Ga) 835 F2d 818, CCH Prod Liab Rep ¶11623.

³¹ *Winslow v Merrifield* (Me) 538 A2d 283.

Penalties for trespass have long been imposed by statutes.³²

■■■■ *Distinction:* The effect of an award of punitive damages in an action for trespass is not the same as that of a fine imposed after a conviction of criminal trespass, since the successful plaintiff, and not the state, is entitled to the money required to be paid by the defendant.³³

Questions as to the existence of the required purpose, motive, or intent of the defendant in an action for multiple damages or a penalty are for the jury.³⁴ Similarly, it is a question for the jury whether the defendant's action is such as comes within the exculpatory provisions of the multiple damage and penalty statutes.³⁵ In awarding treble damages for trespass, it is proper practice for the jury to ascertain the actual damages and for the court to treble them.³⁶

■■■■ *Observation:* A statutory provision, relating to civil judicial remedies for certain kinds of trespass to real property, which is unrelated to another statutory provision dealing with criminal offenses against property involving entirely dissimilar acts, constitutes no basis for the imposition of treble damages for violation of the latter.³⁷

§ 154. Applicability of statutes

Circumstances for which statutes permit the award of treble damages include trespasses without lawful authority,³⁸ and those trespasses which are not casual or involuntary.³⁹ Where a trespass is committed in the erroneous but honest belief that legal authority to commit the act complained of exists, the wrongdoer appears not to be liable for multiple damages,⁴⁰ both where the statute does⁴¹ and where it does not contain exculpatory provisions.⁴² The trespasser does not incur the added liability imposed by a statute, where a trespass is induced by reliance upon a void statute⁴³ or void order of court.⁴⁴

Many states have statutes which impose treble damages for the unauthorized cutting of timber or the destruction of trees on another's property,⁴⁵ some

32. *C. L. Gray Lumber Co. v Pickard*, 220 Miss 419, 71 So 2d 211, 41 ALR2d 920; *Perkins v Hackleman*, 26 Miss 41; *Cooper v Maupin*, 6 Mo 624.

33. § 118.

34. *Morris v West*, 101 Ala 534, 14 So 364; *Kanouse v Donatonia*, 94 NJL 516, 111 A 11.

35. *Connor v McRae*, 193 Mich 682, 160 NW 479; *Helppie v Northwestern Drainage Co.*, 127 Minn 360, 149 NW 461.

36. *Guild v Prentis*, 83 Vt 212, 74 A 1115.

As to the assessment of damages, generally, see § 120.

37. *Desforge v West St. Paul*, 231 Minn 205, 42 NW2d 633, 19 ALR2d 898.

38. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

39. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600; *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 525.

As to the distinction between casual and intentional trespass to real property, see § 30.

40. *Ellard v Goodall*, 203 Ala 476, 83 So 568; *Barnes v Arkansas-Missouri Power Co.*, 220 Mo App 141, 281 SW 93.

41. *Upton v Wimbrow*, 148 Ark 408, 230 SW 277; *Stewart v Sefton*, 108 Cal 197, 41 P 293; *Kilgannon v Jenkinson*, 57 Mich 325, 23 NW 830.

42. *Menasha Woodenware Co. v Spokane I.R. Co.*, 19 Idaho 586, 115 P 22; *Batchelder v Kelly*, 10 NH 436; *Cook v Bennett Gravel Co.*, 90 NJL 9, 100 A 331.

43. *Lindell v Hannibal & S.J.R. Co.*, 25 Mo 550.

44. *Lusby v Kansas C., M. & B.R. Co.*, 73 Miss 360, 19 So 239.

45. *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857; *Winslow v Merrifield* (Me) 538 A2d 283.

For discussion of damages and penalties, generally, for the wrongful cutting of timber,

further providing that double damages may be recovered where the defendant had probable cause to believe that the land on which the trespass was committed was his own.⁴⁶

§ 155. —As affected by willfulness or intent

Once the trespasser forms an intent to enter the land, the trespass becomes willful; thus, under such circumstances a plaintiff may recover treble damages under a statute allowing treble damages for a willful trespass.⁴⁷

■■■■ Observation: The state of mind or moral culpability of the trespasser affects the burden imposed on the trespass victim claiming mental anguish and not the victim's right to the claim of damages.⁴⁸

Where the statute expressly provides for multiple damages for an act committed with specific intent, there can be no recovery unless such intent is proved.⁴⁹ Some courts have held that the act of the defendant need not be intentional,⁵⁰ Although in some jurisdictions the trespass need not be "knowingly" committed in order to render the trespasser liable for multiple damages, other statutes either expressly require this element⁵¹ or are construed to require it.⁵²

Under the specific provisions of some statutes, a trespass must be committed willfully, that is, wantonly and without any reasonable excuse, in order to make the trespasser liable.⁵³ Even where willfulness is not specifically required by statute, the courts have recognized in numerous cases that an act must contain an element of wilfulness in order to render the trespasser liable to increased damages,⁵⁴ particularly where such statutes contain exculpatory provisions.⁵⁵

Liability for statutory damages for trespass may be predicated upon recklessness⁵⁶ or gross or criminal negligence.⁵⁷

see 52 Am Jur 2d, Logs and Timber §§ 125-138.

Forms: Complaint, petition, or declaration—Allegation of demand for statutory penalty prescribed for cutting timber. 8 Am Jur Pl & Pr (Rev), Damages, Form 117.

46. *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

47. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

48. *Harkness v Porter* (La App 2d Cir) 521 So 2d 832, cert den (La) 523 So 2d 1323.

49. *Caldwell Land & Lumber Co. v Hayes*, 157 NC 333, 72 SE 1078.

50. *Fredericksen v Snohomish County*, 190 Wash 323, 67 P2d 886, 111 ALR 75.

51. *Long v Cummings*, 165 Ala 342, 51 So 743; *Smith v Lundy*, 175 Miss 485, 167 So 631 (involving Alabama statute).

52. *Stewart v Sefton*, 108 Cal 197, 41 P 293;

Siuslaw Timber Co. v Russell, 91 Or 6, 178 P 214.

53. *Werner v Flies*, 91 Iowa 146, 59 NW 18.

As to the significance of the defendant's intent respecting criminal trespass, generally, see § 177.

54. *Gebhart v Adams*, 23 Ill 397; *Michigan Land & Iron Co. v Deer Lake Co.*, 60 Mich 143, 27 NW 10; *Fredericksen v Snohomish County*, 190 Wash 323, 67 P2d 886, 111 ALR 75.

55. *Michigan Land & Iron Co. v Deer Lake Co.*, 60 Mich 143, 27 NW 10; *Fredericksen v Snohomish County*, 190 Wash 323, 67 P2d 886, 111 ALR 75.

56. *Ladnier v Ingram Day Lumber Co.*, 135 Miss 632, 100 So 369; *Sample v Reinhard* (Mo App) 253 SW 180.

57. *Seward v West*, 168 Miss 376, 150 So 364.

Mere negligence is not sufficient to authorize the recovery of multiple damages. *Michigan Land & Iron Co. v Deer Lake Co.*, 60 Mich 143, 27 NW 10.

In some cases it has been held that malice need not be proved;⁵⁸ in others it has been held that the plaintiff must prove that the act of the defendant was willful and malicious.⁵⁹

§ 156. Limitations on award

The damages allowed for a trespass to property, awarded pursuant to statute permitting such damages to be doubled or trebled, are those determined by the trier of fact to constitute just compensation within the overall limits of reasonableness, regardless of what specific measure of damages is used.⁶⁰

Damages for trespass should be neither doubled nor tripled under a penal statute providing for such damages if the jury has awarded punitive damages under another penal statute, since that would amount to punishing the defendant twice.⁶¹

In an action for statutory damages for the destruction of trees located on plaintiffs' property, it was improper to direct the jury to insert treble damages if they made a finding of trespass against any defendant, since it is for the court to grant judgment for treble damages for violation of a statute.⁶²

4. PROOF OF DAMAGES [§§ 157-161]

§ 157. Generally; sufficiency of proof

The law infers, without proof of actual injury, some damage from every direct invasion of the person or property of another.⁶³ Although damages need not be proved to a mathematical certainty,⁶⁴ mere conjecture and speculation

58. *Louisville & N.R. Co. v Hill*, 115 Ala 334, 22 So 163; *Wright v Brown*, 5 Kan 600.

59. *McDonald v Montana Wood Co.*, 14 Mont 88, 35 P 668; *Smith & Sargent v American Car Sprinkler Co.*, 78 NH 152, 97 A 872.

60. *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

Where a statute provided that a trespasser who cuts down, injures, destroys, or carries away any tree placed or growing for use or shade on the land of another person shall pay such person treble the value of the thing so damaged, broken, destroyed, or carried away with cost, and where the trial court, without objection, instructed the jury that it may consider the reasonable expenses of necessary repair to any property which was damaged, and the difference in the value of the land with the trees and grounds undisturbed and the value of the land with the trees and ground removed as complained of, the trial court properly trebled the damages in the amount of \$6,508 awarded by the jury. *Arnold v Lee*, 296 Ark 339, 756 SW2d 904.

As to the assessment of damages by the trier of fact, generally, see § 120.

61. *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

Plaintiffs in an action for trespass to land, who were awarded actual damages in the amount of \$1800, with a portion attributable to the destruction of trees, shrubs and brush, trebled pursuant to statute, and also punitive damages in the amount of \$9,000 also pursuant to statute, could not recover both treble damages and punitive damages but were entitled to the amount of \$10,080 representing compensatory damages of \$1,800 plus punitive damages of \$9,000, where the jury had found that the plaintiffs had established by clear and convincing evidence that the defendants had been willfully indifferent to the plaintiffs' rights and awarded punitive damages in accord thereof. *Johnson v Jensen* (Minn) 446 NW2d 664.

Forms: Complaint, petition, or declaration—Allegation of demand for both compensatory and punitive damages. 8 Am Jur Pl & Pr (Rev), Damages, Form 111.

62. *Recchia v Nelson*, 127 Misc 2d 412, 485 NYS2d 963.

63. § 141.

64. *Currier v Cyr* (Me) 570 A2d 1205.

cannot provide the basis for an award of damages in an action for trespass.⁶⁵ An award of damages for a trespass to real property must be supported by some evidence of the value of property damaged or expenses incurred.⁶⁶ However, liability for trespass cannot be escaped on the grounds that the proof as to the amount of damages, if any, is too uncertain to justify the lower court's award, and a party will not be permitted to escape liability because of the lack of a perfect measure of damages which his wrong has caused.⁶⁷

Practice guide: Although a property owner is competent to testify as to the market value of his property, the law does not contemplate that such owner may give an unsupported opinion as to only the amount of decrease in value; in order to sufficiently show loss of value, the property owner must testify to his opinion of the market value of the property prior to the trespass causing its value to decrease and then testify to his opinion of the current value of the property.⁶⁸

§ 158. Proof of actual pecuniary loss

Actual, or compensatory, damages are damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him from, in this case, a trespass.⁶⁹

Comment: When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no trespass been committed.⁷⁰

Practice guide: Compensatory damages that will not be awarded without proof of pecuniary loss include:

- Harm to property.
- Harm to earning capacity.

65. *Koepnick v Sears Roebuck & Co.* (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41; *Ingram v Summerlin*, 179 Ga App 832, 348 SE2d 68.

Where there was evidence that the plaintiffs incurred property damage as a result of the defendant's trespass, but there was no evidence which purported to give a dollar value to the damage, the jury's award of damages on trespass must be reversed. *Dovin v Winfield Township* (2d Dist) 164 Ill App 3d 326, 115 Ill Dec 433, 517 NE2d 1119 (disapproved on other grounds by *Gerill Corp. v Jack L. Hargrove Builders, Inc.*, 128 Ill 2d 179, 131 Ill Dec 155, 538 NE2d 530, cert den (US) 107 L Ed 2d 193, 110 S Ct 243).

66. *Horn v Corkland Corp.* (Fla App D2) 518 So 2d 418, 13 FLW 139; *Currier v Cyr* (Me) 570 A2d 1205.

Where the usual measure of damages for trespass to real property is the difference in the value of the property before and after the trespass, a local nurseryman hired to clean up the property after a trespass which destroyed numerous trees, who could not attest to any difference in value of the property as a result

of the trees being destroyed, properly was not allowed to testify. *Horn v Corkland Corp.* (Fla App D2) 518 So 2d 418, 13 FLW 139.

An award of damages, in the amount of \$3,750, for the plaintiff in a trespass action was not supported by sufficient evidence where the alleged damage from the defendant nailing "no trespassing" signs to 15 or 20 of the plaintiff's trees was not supported by any direct testimony as to the value of the trees or any reduction in their value by the full \$250 per tree awarded. *Currier v Cyr* (Me) 570 A2d 1205.

67. *R & S Dev., Inc. v Wilson* (Miss) 534 So 2d 1008.

68. *Williams v Allied Automotive, Autolite Div.* (ND Ohio) 704 F Supp 782, 19 ELR 20689.

As to the admissibility of the opinion of the plaintiff landowner as to the cost of restoration of his property, where such witness is not a qualified expert, see § 137.

69. § 141.

70. Restatement, Torts 2d § 904, Comment a.

● The creation of liabilities.⁷¹

A monetary award based on a judgmental approximation of damages resulting from a trespass is proper, provided the evidence establishes facts from which the amount of damages may be determined to a probability.⁷²

§ 159. Proof of nonpecuniary loss

Damages for dispossession of property by trespass are not confined to proof of actual pecuniary loss.⁷³

Compensatory damages, that is, damages awarded to a person as compensation, indemnity, or restitution for harm sustained,⁷⁴ may be awarded without proof of pecuniary loss for bodily harm and for emotional distress.⁷⁵

§ 160. —Proof of punitive or exemplary damages

Punitive damages in an action for trespass must be shown by clear and convincing proof.⁷⁶

The trial court properly may deny a defendant's motion for directed verdict in an action for intentional trespass where the plaintiff has introduced evidence sufficient to submit the issue of punitive damages to the jury on plaintiff's count for willful and wanton misconduct.⁷⁷

■■■■ **Caution:** Defense counsel are cautioned that where the propriety of a jury award of punitive damages is first raised in a defense motion for a new trial, the plaintiffs may gain the advantage of hindsight and elect to recover the higher of the two awards.⁷⁸

§ 161. Necessity of proving actual or substantial damages

It is not necessary to prove actual damage in order to recover for a trespass.⁷⁹ In a trespass case, damage is a direct result of some wrongful act, and proof of actual damage is not required because the invasion of the plaintiff's rights is regarded as a tort in itself.⁸⁰ The law infers, without proof

71. Restatement, Torts 2d § 906.

72. *Currier v Cyr* (Me) 570 A2d 1205.

As to the jury's assessment of damages in a trespass action, see § 120.

73. *Owens v Smith* (La App 2d Cir) 541 So 2d 950.

74. § 141.

75. Restatement, Torts 2d § 905.

76. *Jochem v Kerstiens* (Ind App) 498 NE2d 1241.

77. *Rodrian v Seiber* (5th Dist) 194 Ill App 3d 504, 141 Ill Dec 585, 551 NE2d 772.

Forms: Complaint, petition, or declaration—Allegation of demand for exemplary or punitive damages. 8 Am Jur Pl & Pr (Rev), Damages, Forms 112-114.

78. *Johnson v Jensen* (Minn) 446 NW2d 664.

79. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042; *Koep-*

nick v Sears Roebuck & Co. (App) 158 Ariz 322, 762 P2d 609, 10 Ariz Adv Rep 41; *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165; *Owens v Smith* (La App 2d Cir) 541 So 2d 950; *Nappe v Anschelewitz, Barr, Ansell & Bonello*, 97 NJ 37, 477 A2d 1224; *Martin v Reynolds Metals Co.*, 221 Or 86, 342 P2d 790, cert den 362 US 918, 4 L Ed 2d 739, 80 S Ct 672 and (ovrld on other grounds by *Loe v Lenhardt*, 227 Or 242, 362 P2d 312 (ovrld on other grounds by *McLane v Northwest Natural Gas Co.*, 255 Or 324, 467 P2d 635, 35 OGR 368) as stated in *Koos v Roth*, 55 Or App 12, 637 P2d 167, affd 293 Or 670, 652 P2d 1255).

It is error for the court to instruct the jury that if they believe no injury or damage was done by the trespass, they should render a verdict in favor of the defendants. *Attwood & Walker v Fricot*, 17 Cal 37.

As to actual and nominal damages defined and distinguished, generally, see § 141.

80. *Nappe v Anschelewitz, Barr, Ansell & Bonello*, 97 NJ 37, 477 A2d 1224.

of actual injury, some damage from every direct invasion of the person or property of another.⁸¹

Because from every unlawful entry or direct invasion of the person or property of another, the law infers some damage, the prevailing plaintiff is ordinarily entitled, in an action for trespass, to at least nominal damages.⁸² Even in circumstances where no substantial damages result from a trespass and none are proved, the law will infer nominal damage for the unauthorized entry onto real property of another.⁸³

|||| Comment: Nominal damages are properly awarded when, although the plaintiff shows significant harm, its amount is not proved with sufficient certainty to entitle him to an award of compensatory damages.⁸⁴

Once a party proves that he has been trespassed against, that party has a right to nominal damages without specifically proving actual damages,⁸⁵ regardless whether the trespass actually adds value to the property⁸⁶ or whether the plaintiff otherwise benefits from the trespass.⁸⁷ However, a trespasser cannot be held liable for more than nominal damage, unless liability is imputed or unless specific damage proximately caused by his conduct is proved.⁸⁸

81. *Longenecker v Zimmerman*, 175 Kan 719, 267 P2d 543; *Pearl v Pic Walsh Freight Co.* (Hamilton Co) 112 Ohio App 11, 15 Ohio Ops 2d 338, 168 NE2d 571; *Morrison v Smith* (Tenn App) 757 SW2d 678; *Hawkins v Schroeter* (Tex Civ App) 212 SW2d 843.

For discussion of the burden of proof in trespass actions, with respect to damages, see § 216.

82. § 144.

83. *Henderson v For-Shor Co.* (Utah App) 757 P2d 465, 84 Utah Adv Rep 42.

84. Restatement, Torts 2d § 907, Comment c.

85. *Lake Mille Lacs Invest., Inc. v Payne* (Minn App) 401 NW2d 387; *Fairfield Commons Condominium Asso. v Stasa* (Lucas Co) 30 Ohio App 3d 11, 30 Ohio BR 49, 506 NE2d 237, cert den 479 US 1055, 93 L Ed 2d 981, 107 S Ct 930; *Jacobs v Major*, 139 Wis 2d 492, 407 NW2d 832.

86. *Jacobs v Major*, 139 Wis 2d 492, 407 NW2d 832.

87. *Longenecker v Zimmerman*, 175 Kan 719, 267 P2d 543; *Hawkins v Schroeter* (Tex Civ App) 212 SW2d 843.

The trial court erred in holding that, because the plaintiff's property had increased in value as commercial property due to its proximity to the defendant's lead plant, plaintiffs were not allowed to recover from the defendant for the emission of polluting substances onto the

plaintiff's land, since such a rule would allow industries to have absolute control over the use of another's property and this clearly is not the rule for measuring damages in trespass cases in as much as it overlooks the fact that the appreciation factor is totally unrelated to the wrongful acts complained of. *Borland v Sanders Lead Co.* (Ala) 369 So 2d 523, 15 ELR 20934, 2 ALR4th 1042.

The cost of removing dirt placed on the plaintiff's lot by the defendant could not be recovered as damages where the deposit of the dirt was of benefit to the lot. *Murphy v Fond Du Lac*, 23 Wis 365.

88. *Dovin v Winfield Township* (2d Dist) 164 Ill App 3d 326, 115 Ill Dec 433, 517 NE2d 1119 (disapproved on other grounds by *Gerill Corp. v Jack L. Hargrove Builders, Inc.*, 128 Ill 2d 179, 131 Ill Dec 155, 538 NE2d 530, cert den (US) 107 L Ed 2d 193, 110 S Ct 243); *Haase v Helgeson*, 57 Wash 2d 863, 360 P2d 339.

Where the evidence, if believed by the jury, was sufficient to show that a trespass occurred, but that there was no evidence to support an award of \$100 in actual damages resulting from the trespass and the property owner testified that the damages caused as a result of the trespass were not enough to worry about, the trial court erroneously awarded the amount in excess of a nominal sum and that the proper award for damages was the sum of \$1.00. *Henderson v For-Shor Co.* (Utah App) 757 P2d 465, 84 Utah Adv Rep 42.

VI. CRIMINAL LIABILITY [§§ 162-199]

A. IN GENERAL [§§ 162-166]

Research References

16 USCS §§ 21-23, 41, 43, 61, 78, 91, 92, 122, 161, 201 (trespass provisions respecting specific national parks); 18 USCS §§ 1382 (military installations), 1863 (national forest lands), 1991 (trespass on train with intent to commit violence); 28 USCS §§ 2415, 2416 (Indian and public lands); 42 USCS § 2278a (nuclear power installations); 48 USCS § 1710 (right of action for trespass occupancy of submerged lands)

ALR Digest to 3d, 4th, and Federal: Trespass § 16

Index to Annotations: Criminal Law; Defenses; Intentional, Willful, and Wanton Acts; Notice and Knowledge; Property Damage; Res Judicata; Trespass

33 Am Jur Trials 1 §§ 16, 154, Defense of Computer Crime Cases

§ 162. Common law and statutory offense distinguished

Criminal trespass is for the most part a statutory creation.⁸⁹ While certain acts of trespass were regarded as crimes at common law, the distinction between trespasses for which there was a private remedy only and those for which there might be a public prosecution was not laid down with much accuracy or precision.⁹⁰ Because the common law of trespass was viewed as a private wrong, and not an indictable offense, the imposition of criminal sanctions against a trespass must be under the authority of a statute.⁹¹

A statute may define a trespass as a petty disorderly persons offense.⁹²

§ 163. Municipal authority to penalize trespassers; ordinances, generally

Although, as a rule, trespasses against private property are usually redressable by general law and not through the operation of city bylaws,⁹³ a municipal corporation may have statutory authority to penalize one entering private property against the owner's consent.⁹⁴ As in the case of other ordinances regulating personal conduct, such an ordinance, in order to be valid, must not be unreasonable,⁹⁵ and must fall within the limits of the powers granted a municipality by statute or charter.⁹⁶ Further, where a general trespass statute is applicable, no authority requires that a municipality charge a trespasser under a more specific ordinance governing trespassing in parking lots rather than a

⁸⁹ Re Appeal No. 631 (77) etc., 282 Md 223, 383 A2d 684.

⁹⁰ People v Goduto, 21 Ill 2d 605, 174 NE2d 385, 48 BNA LRRM 2126, 42 CCH LC ¶ 50241, cert den 368 US 927, 7 L Ed 2d 190, 82 S Ct 361, 49 BNA LRRM 2173, 43 CCH LC ¶ 50404; White v Mississippi Power & Light Co. (Miss) 196 So 2d 343, 30 ALR3d 754.

⁹¹ State v Zarin, 220 NJ Super 99, 531 A2d 411.

⁹² State in Interest of L.E.W., 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216 (also stating that a person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which

notice against trespass is given by actual communication to the actor).

⁹³ Philadelphia v Brabender, 201 Pa 574, 51 A 374.

⁹⁴ Matthews v State, 81 Ala 66, 1 So 43; Re A. (2nd Dist) 110 Cal App 3d 845, 168 Cal Rptr 338; Chicago v Rosser, 47 Ill 2d 10, 264 NE2d 158; State v Farris (La) 412 So 2d 1039; Baton Rouge v Norman (La) 290 So 2d 865; Kenyon Hotel Co. v Oregon S.L.R. Co., 62 Utah 364, 220 P 382, 33 ALR 343; Seattle v Rice, 93 Wash 2d 728, 612 P2d 792.

⁹⁵ Kenyon Hotel Co. v Oregon S.L.R. Co., 62 Utah 364, 220 P 382, 33 ALR 343.

⁹⁶ Bregguglia v Lord, 53 NJL 168, 20 A 1082.

general trespass statute, simply because the trespass of fact took place in a parking lot.⁹⁷

§ 164. Degrees of trespass; lesser included offenses

A statutory scheme may provide for varying degrees of trespass,⁹⁸ such as trespass in the first or second degree, depending upon the circumstances.⁹⁹ For instance, criminal trespass in the first degree requires proof of possession of a firearm or a deadly weapon, or proof that the defendant had an accomplice who the defendant knew had a deadly weapon; thus, the trial court properly denied the defendant's request to charge criminal trespass in the first degree as a lesser included count of burglary in the second degree where no such element was required for burglary in the second degree and hence the defendant could commit it without committing criminal trespass in the first degree.¹ Another statute provides that a person is guilty of criminal trespass in the second degree if he "knowingly" enters or remains unlawfully in or upon the premises of another.² The same conduct, under the law of another jurisdiction, constitutes criminal trespass in the third degree.³

A statutory scheme which defines four degrees of trespass with distinguishably different essential elements such that simple trespass is not a lesser included offense of any of the three degrees of criminal trespass, defines separate violations rather than separate classes of trespasser.⁴

■■■■ Observation: The crimes of forcible trespass and trespass are not lesser included offenses of attempted first degree burglary, since, for a crime to be a lesser included offense of another crime, the greater crime must contain all of the essential elements of the lesser crime and attempted first degree burglary does not require a commandment forbidding entry or an order to leave as does trespass as defined by statute, nor does it require that defendant enter the lands of another by force, threats

97. *Fardig v Anchorage* (Alaska App) 785 P2d 911, adhered to, on reh (Alaska App) 803 P2d 879.

98. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319; *People v Schmid* (3d Dept) 124 App Div 2d 896, 508 NYS2d 314; *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

A statutory scheme provides that a person is guilty of criminal trespass in the first-degree if he knowingly enters or remains unlawfully in a building, and that a person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises of another. *State v Brown*, 50 Wash App 873, 751 P2d 331.

99. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319; *In Interest of W.D.*, 232 Neb 581, 441 NW2d 608; *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

Trespass to fenced-in areas is outside the

scope of the general criminal trespass-to-buildings statute, but are intended to be covered by the broader definition of premises in a second-degree criminal trespass statute. *State v Brown*, 50 Wash App 873, 751 P2d 331.

1. *People v Calandrillo* (2d Dept) 134 App Div 2d 271, 520 NYS2d 604, app den 70 NY2d 1004, 526 NYS2d 939, 521 NE2d 1082.

2. *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

As to particular conduct prohibited by trespass statutes, including unauthorized entry and unlawful remaining, see §§ 185 et seq.

3. *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831.

4. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

■■■■ Observation: Even if different classes of trespassers were defined by various trespass statutes, reasonable classifications do not violate the right to equal protection under the law. § 196.

of force, or by a show of strength of a multitude of people, as does forcible trespass as defined by statute.⁵

§ 165. Purpose of statutes

The right to exclude others is an essential property right which may be protected, in appropriate cases, by the utilization of criminal trespass laws.⁶ Thus, the legislative purposes of some criminal trespass statutes to protect any possessor of land, whether titleholder or not, from intrusions by unwanted persons,⁷ and to prevent violence or threats of violence, the legislatures in some jurisdictions having determined that when a person refuses to leave another's property after he has been ordered to do so, a threat of violence becomes imminent.⁸

The purpose of a home invasion statute is to protect persons in their homes.⁹

■■■ Illustration: An automobile is not a "place" within the scope of a statute which provides that a person commits second degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given inasmuch as the statute was intended to protect real property and not meant to prohibit unauthorized entry into a stationary vehicle.¹⁰

§ 166. —Substitute for civil remedy

Criminal trespass statutes do not afford a substitute for adequate civil remedies for trespass.¹¹ It is an abuse of a penal statute relating to criminal trespass to use it to try disputed rights in real property.¹² Accordingly, such a statute cannot be made to serve the purposes of a civil action of trespass or ejectment, and if the defendant, when warned not to enter, was in possession, or had title and right of entry, a prosecution under the statute cannot be sustained.¹³ The courts do not agree, however, whether one may be prosecuted under such a statute for an entry under a bona fide claim of title.¹⁴

B. APPLICATION OF STATUTES [§§ 167–199]

Research References

16 USCS §§ 21-23, 41, 43, 61, 78, 91, 92, 122, 161, 201 (trespass provisions)

5. *State v McAlister*, 59 NC App 58, 295 SE2d 501, petition den 307 NC 471, 299 SE2d 226.

For discussion of burglary and trespass, see 13 Am Jur 2d, Burglary § 35.

6. *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

7. *State v Delgado*, 19 Conn App 245, 562 A2d 539; *People v Wyant* (3d Dist) 171 Ill App 3d 306, 121 Ill Dec 533, 525 NE2d 591, app den 122 Ill 2d 592, 125 Ill Dec 234, 530 NE2d 262.

Criminal trespass statutes are intended to protect the rights in those in lawful control of the property to forbid entrance by those whom they are unwilling to receive, and to exclude them if, having entered, those in control see fit to command them to leave. *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188.

8. *People v Wyant* (3d Dist) 171 Ill App 3d 306, 121 Ill Dec 533, 525 NE2d 591, app den 122 Ill 2d 592, 125 Ill Dec 234, 530 NE2d 262.

9. *People v Kolls* (2d Dist) 179 Ill App 3d 652, 128 Ill Dec 491, 534 NE2d 673, app den 126 Ill 2d 564, 133 Ill Dec 674, 541 NE2d 1112.

10. *In Interest of W.D.*, 232 Neb 581, 441 NW2d 608.

11. *State v Larason* (CP) 75 Ohio L Abs 211, 143 NE2d 502.

12. *Steele v State*, 191 Ind 350, 132 NE 739, 18 ALR 500; *State v Larason* (CP) 75 Ohio L Abs 211, 143 NE2d 502.

13. *Watson v State*, 63 Ala 19.

14. *Randle v State*, 155 Ala 121, 46 So 759; *State v Ellen*, 68 NC 281.

respecting specific national parks); 18 USCS §§ 1382 (military installations, 1863 (national forest lands); 28 USCS §§ 2415, 2416 (Indian and public lands), 2415(b) (limitations for action to recover damages for trespass on federal lands); 42 USCS § 2278a (nuclear power installations); 48 USCS § 1710 (right of action for trespass occupancy of submerged lands)

ALR Digest to 3d, 4th, and Federal: Trespass § 16

Index to Annotations: Criminal Law; Defenses; Intentional, Wilful, and Wanton Acts; Notice and Knowledge; Trespass

1. CONSTRUCTION OF TERMS [§§ 167-176]

a. IN GENERAL [§§ 167, 168]

§ 167. Generally

In applying a criminal trespass statute, courts generally must follow the plain and unambiguous meaning of the statutory language, and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.¹⁵ For instance, where a statute criminalizes the unlicensed entry of structures, and another statute expressly defines what is a structure, unless a structure is involved, there can be no offense of criminal trespass.¹⁶

Penal statutes governing trespass are to be strictly construed¹⁷ against the state and in favor of the defendant.¹⁸ A criminal trespass statute which prohibits unlawfully remaining upon the land of another after being forbidden to do so, while on its face may appear strikingly similar to the common law civil trespass, is a penal statute and, therefore, is generally construed to require a willful trespass.¹⁹

A statute which prohibits “knowing interference with the use of another’s property” does not require that the defendant be actually on the property, where the defendant was clearly interfering with access to the property.²⁰

§ 168. Exemptions from statute

Criminal trespass statutes have, in some jurisdictions, been construed to exempt from prosecution union representatives who, in accord with a collective bargaining agreement, are conducting safety inspections and preparing steward’s reports at a construction jobsite and, thus, are engaged in lawful union activity.²¹ In construing a criminal trespass statute which excepts from its scope “any lawful activity for the purpose of engaging in any organized effort on behalf of any labor union,” a court properly may conclude that the legislature, in dealing with trespasses, specifically subordinated the rights of the property owner to those of persons engaged in lawful labor activities such

15. *United States v Albertini*, 472 US 675, 86 L Ed 2d 536, 105 S Ct 2897, on remand (CA9 Hawaii) 783 F2d 1484, later proceeding (CA9 Hawaii) 830 F2d 985.

16. § 188.

17. *Watson v State*, 63 Ala 19; *State v Larason* (CP) 75 Ohio L Abs 211, 143 NE2d 502.

18. *State v Zarin*, 220 NJ Super 99, 531 A2d 411.

19. *Commonwealth v Richardson*, 313 Mass 632, 48 NE2d 678, 146 ALR 648; *Reed v Commonwealth*, 6 Va App 65, 366 SE2d 274.

20. *Kerr v State*, 193 Ga App 165, 387 SE2d 355.

21. *Re Catalano*, 29 Cal 3d 1, 171 Cal Rptr 667, 623 P2d 228, 106 BNA LRRM 2565, 94 CCH LC ¶ 55340.

that an employer could not enjoin the peaceful union picketing of a shopping center.²²

Since there is no legitimate need for a farmer to deny a migrant worker living on the farmer's property the opportunity for aid available from federal, state, or local services, or from recognized charitable groups seeking to assist him, some state criminal trespass statutes do not apply to representatives of such agencies and organizations entering such property to perform their duties.²³

Where a criminal trespass statute expressly exempts any person living on the land with permission of the owner or his agent having apparent authority, whether that permission may be considered as a license or some other arrangement does not effect such person's status; and, conversely, if a person does not live on the land, permission to be there in any form does not bring him within the scope of the statutory exemption.²⁴

Those who are otherwise in violation of a criminal trespass statute are not exempted from prosecution thereunder by the mere fact that while in the course of their trespass, they were exercising first amendment rights.²⁵

b. CONSTITUTIONALITY [§§ 169-176]

§ 169. Generally; due process and equal protection

The proposition, that in applying criminal statutes, courts generally must follow the plain and unambiguous meaning of the statutory language, and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language,²⁶ is not altered simply because the application of a trespass statute is challenged on constitutional grounds.²⁷

Prohibitions against trespass upon real property after warning is given are constitutional.²⁸

Even where different classes of trespassers are defined by various trespass statutes, reasonable classifications do not violate the right to equal protection under the law.²⁹

§ 170. First amendment rights; exercise of rights, generally

A general trespass statute may be constitutionally applied, even to those

22. *Re Catalano*, 29 Cal 3d 1, 171 Cal Rptr 667, 623 P2d 228, 106 BNA LRRM 2565, 94 CCH LC ¶ 55340.

As to injunctive relief against continuing trespasses, see §§ 113 et seq.

As to picketing and other labor union activity as being within criminal trespass statutes, see 48 Am Jur 2d, Labor and Labor Relations §§ 2063 et seq.

23. *State v Shack*, 58 NJ 297, 277 A2d 369, 77 BNA LRRM 2408 (ownership of real property does not include the right to bar access to governmental services available to migrant workers).

24. *People v Mortenson* (2d Dist) 178 Ill App, 3d 871, 128 Ill Dec 46, 533 NE2d 1134.

25. § 170.

26. § 167.

27. *United States v Albertini*, 472 US 675, 86 L Ed 2d 536, 105 S Ct 2897, on remand (CA9 Hawaii) 783 F2d 1484, later proceeding (CA9 Hawaii) 830 F2d 985.

For discussion of the constitutionality of statutes, generally, see 16 Am Jur 2d, Constitutional Law §§ 150-276.

28. *Corn v State* (Fla) 332 So 2d 4.

As to the requirement, generally, that criminal trespass statutes provide for notice or warning, see §§ 177 et seq.

29. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

As to the constitutionality of class legislation, see 16 Am Jur 2d, Constitutional Law §§ 735-803.

who trespass to communicate or exercise their right of expression under either the federal or state constitutions, so long as it is applied without discrimination and is not used to purposefully suppress speech as protected by the first amendment.³⁰ The first amendment is not a license to trespass.³¹ People who want to propagandize protests or views have no constitutional right to do so whenever and however and wherever they please.³² There is no constitutional right to freedom of movement or freedom of worship on private property where there is no license or privilege to be there.³³ Application and enforcement of trespass laws by the government should not have the effect of transforming private interference with free speech activities into state interference; to so hold would preclude the private property owner from enforcing his rights to exclude others and convert his property into a public forum, open to the free use of any person exercising a First Amendment right.³⁴

Those who are otherwise in violation of a criminal trespass statute are not exempted from prosecution thereunder by the mere fact that while in the course of their trespass, they were displaying signs, distributing leaflets, or otherwise exercising first amendment rights.³⁵ The fact that a criminal trespass defendant's presence may also be expressive does not prevent it from simultaneously being declared a trespass; once defendant's conduct is declared unlawful, the appropriate inquiry becomes whether the statute or regulations declaring such conduct unlawful, as applied to the defendant, violate his first amendment rights.³⁶

30. *Gibbons v State* (Tex App Dallas) 775 SW2d 790.

Even if a person's first amendment rights were implicated upon arrest for trespass, in attempting to see a United States Senator personally and remaining in his office after being asked to leave by a person lawfully in charge, that person's rights would not be violated where the evidence clearly established the additional specific factor of an established policy of the particular Senator's office, identified as a rule of congressional courtesy, under which appointments would generally be made for the Senator's own constituents, but citizens from other states would be referred to their own Senators, that is, a content-neutral policy unrelated to the exercise of first amendment rights, and narrowly tailored to further a significant government interest in permitting the Senator's office to be able to serve his constituents fully and effectively. *Hemmati v United States* (Dist Col App) 564 A2d 739.

Annotations: Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 ALR4th 773 § 7.

31. *Belluomo v Kake TV & Radio, Inc.*, 3 Kan App 2d 461, 596 P2d 832.

32. *Corn v State* (Fla) 332 So 2d 4; *Brooks v State*, 170 Ga App 440, 317 SE2d 552.

Blocking access to public and private buildings has never been upheld as a proper method of communication in an orderly soci-

ety, and the first amendment may not be read to protect a person's right to express his views at any time, in any manner, and in any place of his choosing. *New York State NOW v Terry* (CA2 NY) 886 F2d 1339, 14 FR Serv 3d 922, later proceeding (SD NY) 1990 US Dist LEXIS 1905, withdrawn, reported at (SD NY) 732 F Supp 388, motion to vacate den (SD NY) 737 F Supp 1350 and cert den (US) 109 L Ed 2d 532, 110 S Ct 2206.

33. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

34. *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

35. *People v Harrison*, 383 Mich 585, 178 NW2d 650.

Defendants' rights to freedom of speech, press, assembly, or petition are not violated by state convictions for refusing to leave, upon the request of a sheriff, the jail grounds on which they had gathered to protest against the arrest of student demonstrators. *Adderley v Florida*, 385 US 39, 17 L Ed 2d 149, 87 S Ct 242, reh den 385 US 1020, 17 L Ed 2d 559, 87 S Ct 698.

For discussion of construction of statutory exemptions from trespass, see § 168.

As to picketing and other labor union activity as being within criminal trespass statutes, see 48 Am Jur 2d, Labor and Labor Relations §§ 2063 et seq.

36. *United States v Gilbert* (ND Ga) 720 F

■■■ Illustration: In determining whether a demonstration or protest on particular premises of a federal building constitutes an unlawful trespass, where the issue of trespass is intertwined with the first amendment issues of freedom of expression, the court, to determine the use to which the federal property is lawfully dedicated, is to characterize the premises as a public or nonpublic forum which, in turn, determines what standards to apply to government restrictions on speech on that portion of the premises.³⁷

■■■ Practice guide: It is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the first amendment even applies.³⁸

The first amendment guarantees preclude the application of a criminal trespass statute to those who distribute religious literature on the street³⁹ or who undertake to call at residences to distribute religious literature or to espouse religious views.⁴⁰

§ 171. —Exercise on private property

A person is not afforded a first amendment right to free speech on private property.⁴¹ The characterization of premises as nonpublic fora for expression has two implications: first, use of that area for protest may contravene the purpose for which the property was dedicated and therefore constitute an unlawful trespass; second, the government's ability to restrict speech in nonpublic fora is greater, and attempts to do so are examined by the courts with minimal scrutiny.⁴²

A criminal trespass statute is not unconstitutionally applied when invoked against persons present on private property contrary to the wishes of a person in authoritative control of such property, even where such uninvited persons assert first amendment rights, if there is no showing of discriminatory intent in the invocation of the statute, the property has not been dedicated to a public use, and the subject matter of the asserted first amendment rights is unrelated

Supp 1554, *affd* in part and *revd* in part (CA11 Ga) 920 F2d 878.

37. *United States v Gilbert* (ND Ga) 720 F Supp 1554, *affd* in part and *revd* in part (CA11 Ga) 920 F2d 878.

As to trespass on federal lands or at particular federal facilities, see §§ 192 *et seq*.

38. *United States v Powell* (Dist Col App) 563 A2d 1086.

39. *Marsh v Alabama*, 326 US 501, 90 L Ed 265, 66 S Ct 276 (diverged from on other grounds by *Lloyd Corp. v Tanner*, 407 US 551, 33 L Ed 2d 131, 92 S Ct 2219) as stated in *Hudgens v NLRB*, 424 US 507, 47 L Ed 2d 196, 96 S Ct 1029, 91 BNA LRRM 2489, 78 CCH LC ¶ 11278, on remand (CA5) 531 F2d 1342, 92 BNA LRRM 3152, later proceeding 230 NLRB 414, 95 BNA LRRM 1351, 1977-78 CCH NLRB ¶ 18290.

40. *Tucker v Texas*, 326 US 517, 90 L Ed 274, 66 S Ct 274.

41. *State v Scholberg* (Minn App) 395 NW2d 454.

Freedom of expression is not protected on a privately owned street on church property, where a church policy prohibited picketing or demonstrating on the street and where the church did not want the defendant trespassing upon its property while engaging in activities which were against church policy, notwithstanding that during the daytime hours, the same street is open to access by the general public. *Gibbons v State* (Tex App Dallas) 775 SW2d 790.

42. *United States v Gilbert* (ND Ga) 720 F Supp 1554, *affd* in part and *revd* in part (CA11 Ga) 920 F2d 878.

For discussion of first amendment rights, generally, with respect to public and private fora, see 16A Constitutional Law §§ 517 *et seq*.

to the nature of, or business activity conducted on, the premises of the private property.⁴³

A number of courts have rejected the contention that demonstrators, charged with entering onto private business or utility premises for public demonstration purposes have a legitimate first amendment right to be on the premises in question.⁴⁴ A health services center is not public in nature and its parking lot is not public property such that state and federal free speech guarantees foreclose prosecution for trespass under a statute which makes it unlawful for any person, firm, or corporation to commit a trespass upon either public or private property without consent of the owner of the property.⁴⁵ Thus, a statute prohibiting criminal trespass to a medical facility, although its effect may be to prevent abortion protestors from advocating their position, does not unconstitutionally restrict their right to express their views on abortion, where the medical facility as defined by statute is a nonpublic forum.⁴⁶ Further, state constitutional free speech provisions do not extend to protect antiabortion activities conducted on the grounds of a private medical clinic.⁴⁷

The specific invitation extended by physicians, tenants of a professional center, to members of the public to seek their medical expertise is not sufficient to classify the center as open to public use, where the center was not the functional equivalent of a public place; thus, a pro-life activist, on the premises of center exclusively reserved for the use of the center, its owners and tenants, and the members of the public transacting business with them, had no constitutional right of access to the center for speech activities.⁴⁸

■■■■ Observation: Property does not lose its private character merely because the public is generally invited to use it for designated purposes.⁴⁹

The first amendment does not preclude the conviction, under a federal statute prohibiting trespassing on federal military installations after receiving an order barring entry or reentry, of a demonstrator who trespasses after

43. *State v Marley*, 54 Hawaii 450, 509 P2d 1095; *State v Martin*, 199 La 39, 5 So 2d 377.

44. *State v Martin*, 35 Conn Supp 555, 398 A2d 1197; *Grogan v United States* (Dist Col App) 435 A2d 1069; *State v Marley*, 54 Hawaii 450, 509 P2d 1095; *Chicago v Rosser*, 47 Ill 2d 10, 264 NE2d 158; *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188; *State v Brechon* (Minn) 352 NW2d 745; *State v Weitzman*, 121 NH 83, 427 A2d 3; *State v Koski*, 120 NH 112, 411 A2d 1122; *People v Segal*, 78 Misc 2d 944, 358 NYS2d 866; *State v Horn* (App) 126 Wis 2d 447, 377 NW2d 176, affd 139 Wis 2d 473, 407 NW2d 854.

Annotations: Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 ALR4th 773 § 7.

45. *Fardig v Anchorage* (Alaska App) 785 P2d 911, adhered to, on reh (Alaska App) 803 P2d 879.

46. *State v Migliorino*, 150 Wis 2d 513, 442 NW2d 36, cert den (US) 107 L Ed 2d 560, 110 S Ct 565.

47. *State v Horn*, 139 Wis 2d 473, 407 NW2d 854.

48. *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

A criminal trespass statute was constitutionally applied to a man who first picketed outside a clinic that performed abortions and then entered the building, where since the clinic had more aspects of private property than public property, defendant's right to free speech was not infringed. *Hoffart v State* (Tex App Houston (14th Dist)) 686 SW2d 259, petition for discretionary review ref (Feb 26, 1986) and motion for rehearing on PDR denied (Apr 16, 1986) and cert den 479 US 824, 93 L Ed 2d 46, 107 S Ct 95, reh den 479 US 977, 93 L Ed 2d 423, 107 S Ct 478.

49. *Fardig v Anchorage* (Alaska App) 785 P2d 911, adhered to, on reh (Alaska App) 803 P2d 879.

receiving an order as required by statute,⁵⁰ since a military base is ordinarily not a public forum for first amendment purposes.⁵¹ However, plaintiffs who distributed leaflets inside an open military base, which allowed public traffic on its roadways and provided public facilities, could not be prosecuted for trespass.⁵²

§ 172. —Exercise on public property

A statute may legitimately criminalize an act of peaceful but unauthorized continued presence on public property for purposes other than those to which the property has been dedicated,⁵³ and the fact that one is exercising first amendment rights while violating otherwise proper restrictions upon their entry to a public facility does not insulate such persons from prosecution for trespass.⁵⁴

The United States Constitution does not forbid a state to control the use of its property for its own lawful nondiscriminatory purpose.⁵⁵ The first amendment does not guarantee access to property simply because it is owned or controlled by the government.⁵⁶ The state, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.⁵⁷ Thus, nothing in the federal constitution prevents a state from even-handed enforcement of its general trespass statute against those refusing to obey a sheriff's order to remove themselves from what amounts to the curtilage of government-owned property.⁵⁸

In the face of actual notice, the public nature of the premises makes no

50. *United States v Albertini*, 472 US 675, 86 L Ed 2d 536, 105 S Ct 2897, on remand (CA9 Hawaii) 783 F2d 1484, later proceeding (CA9 Hawaii) 830 F2d 985; *United States v Walsh* (CA9 Ariz) 770 F2d 1490.

As to the prohibition against trespass on military installations, generally, see § 193.

Annotations: Validity, construction, and application of 18 USCS § 1382, prohibiting trespass on military installation, 12 ALR Fed 638 § 4.

51. *United States v Albertini*, 472 US 675, 86 L Ed 2d 536, 105 S Ct 2897, on remand (CA9 Hawaii) 783 F2d 1484, later proceeding (CA9 Hawaii) 830 F2d 985.

52. *Flower v United States*, 407 US 197, 32 L Ed 2d 653, 92 S Ct 1842; *CCCO—Western Region v Fellows* (ND Cal) 359 F Supp 644.

53. § 190.

54. *Downer v State* (Fla) 375 So 2d 840.

55. *Brooks v State*, 170 Ga App 440, 317 SE2d 552.

56. *Hemmati v United States* (Dist Col App) 564 A2d 739 (an Iranian citizen had no right to remain in a Senator's office after being told by the agent of the person lawfully in charge to leave).

57. *Downer v State* (Fla) 375 So 2d 840; *Brooks v State*, 170 Ga App 440, 317 SE2d 552.

Where neither an unenclosed plaza nor a covered portico was intended to be used as a campsite, the defendant's maintaining a bed-roll, sleeping, bathing, and doing laundry are all activities which contravene the purpose for which the federal building and its grounds were dedicated; consequently, the defendant's continued use of the property as a residence, notwithstanding the assertion that he is expressing first amendment rights, after receiving notice to leave, is unlawful and constitutes a trespass under state law. *United States v Gilbert* (ND Ga) 720 F Supp 1554, *affd* in part and *revd* in part (CA11 Ga) 920 F2d 878.

An arrest for criminal trespass was an appropriate limitation on the defendant's freedom of speech in order to protect the public from boisterous and threatening conduct that disturbed the tranquility of the place selected by the people for voter registration, where, on election day, the defendant became disruptive and created an outburst which brought the registration of other voters to a standstill after which he refused to leave and persisted in a noisy protest until a police officer was required forcibly to remove and arrest him. *State v Chiapetta* (Me) 513 A2d 831.

58. *Downer v State* (Fla) 375 So 2d 840.

difference, except where the defendant's constitutional rights are in some way impaired.⁵⁹ For instance, the order of a store employee, pursuant to company policy, directing defendants, while seeking signatures on several initiative petitions, to leave the sidewalk between the parking lot of the store and the store's main entrance was not a "lawful order," because using it as a foundation for a criminal prosecution would improperly interfere with the people's right under the state constitution to initiate legislation.⁶⁰ Similarly, a person who peacefully distributes handbills in front of a business enterprise in the public areas of a privately owned shopping center, the sole subject matter of which publicized a labor dispute between his employer labor union and said business, should not be prosecuted for criminal trespass, since such activity is protected by the first and fourteenth Amendments to the U.S. Constitution.⁶¹

There is no constitutional impediment to the enforcement of the general criminal trespass statute on state college campuses.⁶² However, a statute in effect giving school officials unfettered discretion as to the reasons for which they could ask persons to leave the premises, and punishing disobedience to such requests, violates first amendment rights and is invalid.⁶³

Practice guide: The purpose of the requirement of the "additional specific factor," establishing a person's lack of a legal right to remain on public property, as an element of the government's proof of an unlawful entry, is to protect any first amendment rights which may be implicated in the defendant's conduct, so that the individual's lawful presence is not conditioned upon the mere whim of a public official.⁶⁴

§ 173. Vagueness of terms

Where the terms of a criminal trespass statute are of such common understanding and usage that persons of ordinary intelligence are fully able to determine what conduct is proscribed, such terms do not constitute the statute void for vagueness.⁶⁵ Thus, such a statute is not unconstitutionally vague where any reasonable person can understand that the statute proscribes going on, attempting to go on, and remaining on property belonging to another without authority and after having been forbidden to do so, and where the

59. State in Interest of L.E.W., 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216.

As to the constitutionality of criminal trespass statutes, see §§ 169 et seq.

60. State v Cargill, 100 Or App 336, 786 P2d 208, review gr 310 Or 133, 794 P2d 794.

61. State v Rose, 44 Ohio Misc 17, 73 Ohio Ops 2d 77, 335 NE2d 758.

As to picketing and other labor union activity as being within criminal trespass statutes, see 48 Am Jur 2d, Labor and Labor Relations §§ 2063 et seq.

62. Grattan v Board of School Comrs. (CA4 Md) 805 F2d 1160, 123 BNA LRRM 3199; Braxton v Municipal Court for San Francisco Judicial Dist., 10 Cal 3d 138, 109 Cal Rptr 897, 514 P2d 697; Brooks v State, 170 Ga App 440, 317 SE2d 552; People v Barnett (1st Dist) 7 Ill

App 3d 185, 287 NE2d 247; Kirstel v State, 13 Md App 482, 284 A2d 12, 50 ALR3d 328, app dismd 409 US 943, 34 L Ed 2d 214, 93 S Ct 287 (free speech and assembly).

For discussion of school trespass statutes, generally, see § 195.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 7[a].

63. Grody v State, 257 Ind 651, 278 NE2d 280.

64. United States v Powell (Dist Col App) 563 A2d 1086.

65. Downer v State (Fla) 375 So 2d 840; A.C. v State (Fla App D3) 538 So 2d 136, 14 FLW 439.

statute clearly describes the types of property effected and the means by which the prohibition against entry may be communicated.⁶⁶

A criminal trespass ordinance prohibiting persons from hunting or fishing on any "unenclosed land or waters" without first obtaining the approval of the owner or lessee thereof is unconstitutionally vague since the ordinance does not define "unenclosed land or waters".⁶⁷

A criminal trespass statute criminalizing the failure of a person to leave premises that are open to the public after being lawfully directed to do so personally by the person in charge is not unconstitutionally void for vagueness when read in light of the applicable mens rea and where the state must prove the appropriate mens rea for the offense.⁶⁸

§ 174. —"Remain"

The term "remain," in a criminal trespass statute prohibiting unlawful remaining, can be construed according to its ordinary usage; the meaning of remain is to stay, and a stay of any length of time after entry satisfies the requirement that the defendant remain.⁶⁹ Under a statute providing that a person commits the crime of criminal trespass by entering or remaining unlawfully in or on premises, the phrase "remain unlawfully" includes the failure to leave premises that are open to the public after being lawfully directed to do so by the person in charge.⁷⁰

A person will be deemed to remain unlawfully on property when he or she does so without license or privilege,⁷¹ and even if the term "remain" were found to be constitutionally vague, proof of entry would suffice.⁷²

§ 175. —"Lawful order"

A statute providing that a person may be convicted of criminal trespass for remaining in any place in defiance of a lawful order to leave is not unconstitutionally vague on its face for the term "lawful order," where the court had previously construed the statute to mean, with regard to property upon which the general public is invited to enter, that an order to leave the premises is lawful only when the owner has some justification for requesting removal, and

66. *A.C. v State* (Fla App D3) 538 So 2d 136, 14 FLW 439; *State on behalf of J.A.V. (La)* 558 So 2d 214.

An ordinance providing that whoever shall enter into the house or enter upon the premises or within the enclosure of another person, without the consent or permission of the owner, agent or possessor of such house, premises or enclosure, shall be guilty of trespass is not unconstitutionally vague and overbroad inasmuch as its language provides an adequate warning as to what conduct is proscribed. *Baton Rouge v Norman (La)* 290 So 2d 865.

67. *State v Farris (La)* 412 So 2d 1039.

68. *Johnson v State (Alaska App)* 739 P2d 781.

69. *Hernandez v State (Tex App San Antonio)* 783 SW2d 764.

70. *State v Cargill*, 100 Or App 336, 786 P2d 208, review gr 310 Or 133, 794 P2d 794.

Appellants, women conducting a consumer inspection of a hospital maternity facility, were properly charged and convicted with trespass due to their entry into the postpartum area, which contains the nursery for newborn infants and labor and delivery rooms, where the hospital was clearly entitled to reasonably restrict the access to the general public of this area in order to prevent noisy disturbances and the possible spread of germs to mothers in active labor and to their newborn children. *Downer v State (Fla)* 375 So 2d 840.

71. *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831.

72. *Hernandez v State (Tex App San Antonio)* 783 SW2d 764.

where the trespass offense is defined with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.⁷³ On the other hand, a criminal trespass ordinance which states that a person who, regardless of his intent, enters or remains in or upon premises which are at time open to public does so with license and privilege unless he defies lawful order not to enter or remain, personally communicated to him by owner of premises or some other authorized person, is not sufficiently specific so as to inform persons of reasonable understanding of what conduct is proscribed.⁷⁴ In such a case, the term "lawful order" is unconstitutionally vague, in that many questions must be answered to determine if order is lawful, such as who is an authorized person, was the substance of order lawful, was there valid reason for the order, and how long is order to be in effect, thus inviting unequal enforcement and giving unfettered discretion to police and to courts.⁷⁵

Orders of a store employee to a known shoplifter not to enter any of a company's stores or that a disruptive person leave a public hearing are "lawful orders" sufficient for a foundation for a criminal prosecution for trespass.⁷⁶

|||| Distinction: The order of a store employee, pursuant to company policy, directing defendants, while seeking signatures on several initiative petitions, to leave the sidewalk between the parking lot of the store and the store's main entrance was not a "lawful order," because using it as a foundation for a criminal prosecution would improperly interfere with the people's right under the state constitution to initiate legislation.⁷⁷

A federal statute, which penalizes entry upon a military installation for a purpose prohibited by law or lawful regulation and which penalizes any presence or re-entry upon such an installation after removal therefrom or an order from the commanding officer not to re-enter, is not void for vagueness because of the possibility of close questions arising as to whether the communication as given was a lawful order not to reenter, or whether it was properly given by a commanding officer.⁷⁸

§ 176. —Other particular terms

A statute penalizing every trespass upon the property of another committed with a "malicious and mischievous intent" is not void on the ground of vagueness, there being no lack of notice and nothing to entrap the unwary, since the requirement of a malicious and mischievous intent narrows the scope of the offense and makes its meaning more understandable and clear.⁷⁹

Where the alleged objectionable terms, "knowing," "license," and "privilege," of a statute which makes a person guilty of trespass who, knowing that he is not licensed or privileged to do so, enters any premises without intent to

73. *State v Chiapetta* (Me) 513 A2d 831.

74. *Seattle v Rice*, 93 Wash 2d 728, 612 P2d 792.

75. *Seattle v Rice*, 93 Wash 2d 728, 612 P2d 792.

76. *State v Cargill*, 100 Or App 336, 786 P2d 208, review gr 310 Or 133, 794 P2d 794.

77. *State v Cargill*, 100 Or App 336, 786 P2d 208, review gr 310 Or 133, 794 P2d 794.

78. *United States v Douglass* (CA9 Wash) 579 F2d 545.

As to trespass on federal military installations, generally, see § 193.

79. *Adderley v Florida*, 385 US 39, 17 L Ed 2d 149, 87 S Ct 242, reh den 385 US 1020, 17 L Ed 2d 559, 87 S Ct 698.

harm any property, are not ambiguous and are clearly defined in law, the statute is not unconstitutionally vague.⁸⁰

A statute providing in part that one who enters or remains in any structure without being "authorized, licensed or invited" commits the offense of trespass, is not constitutionally vague or overbroad, even though such terms are not expressly defined in the statute, since such terms are of such common understanding and usage that persons of ordinary intelligence are fully able to determine what conduct is proscribed.⁸¹

2. REQUIREMENT OF NOTICE OR WARNING [§§ 177-180]

§ 177. Generally

Many criminal trespass statutes require that notice or warning be given to a person that his presence on the premises is prohibited,⁸² since many criminal statutes require that the trespass be knowingly committed.⁸³ Thus, some form of communication of any restrictions on the use of land to those entering is essential to a successful trespass prosecution under a statute which provides that no person, without privilege to do so, shall knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows he is in violation of any such restriction or is reckless in that regard.⁸⁴

With respect to trespass by entering and remaining in any place as to which notice against trespass has been given by actual communication to the actor, the state is obliged to show that such person had notice against trespass.⁸⁵ For instance, where a statute makes a person's conduct criminal only when he refuses or fails to leave school buildings or grounds after being requested to do so by an authorized employee of the institution, the defendant may not properly be found to have committed the offense of trespass where he was immediately arrested after failing to disclose to a vice principal reasons sufficient to justify his presence, and where no request to leave was made.⁸⁶

80. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

81. *Downer v State (Fla)* 375 So 2d 840.

82. *United States v Gilbert* (ND Ga) 720 F Supp 1554, affd in part and revd in part (CA11 Ga) 920 F2d 878; *State v Delgado*, 19 Conn App 245, 562 A2d 539; *State v Mention*, 12 Conn App 258, 530 A2d 645, certf den 205 Conn 809, 532 A2d 78; *Woll v United States* (Dist Col App) 570 A2d 819; *Corn v State (Fla)* 332 So 2d 4; *State v McCormack* (Fla App D3) 517 So 2d 73, 12 FLW 2862; *Watson v State*, 190 Ga App 671, 379 SE2d 811; *People v Mortenson* (2d Dist) 178 Ill App 3d 871, 128 Ill Dec 46, 533 NE2d 1134; *State v Dansinger* (Me) 521 A2d 685; *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188; *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certf den 122 NJ 144, 584 A2d 216; *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831; *Commonwealth v Downing*, 511 Pa 28, 511 A2d 792; *Commonwealth v Walker*,

384 Pa Super 562, 559 A2d 579; *State v Car-gill*, 100 Or App 336, 786 P2d 208, review gr 310 Or 133, 794 P2d 794; *Bader v State* (Tex App Corpus Christi) 777 SW2d 178.

■■■■ *Observation:* Where a trespass statute does not require a warning in order for the defendants to be prosecuted, they are not entitled to a jury instruction that the jury must find there was a warning by the land owners to the defendants. *Howard v State* (Ala App) 506 So 2d 351.

83. § 181.

84. *State v McMechan* (Butler Co) 48 Ohio App 3d 261, 549 NE2d 211.

85. *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certf den 122 NJ 144, 584 A2d 216.

86. *Re Appeal No. 631* (77) etc., 282 Md 223, 383 A2d 684.

As to statutes expressly prohibiting trespass on school grounds, generally, see §§ 194 et seq.

§ 178. Manner of giving notice or warning

The type of notice required and the time allowed for departure of a trespasser who has been requested to leave the premises of another depend upon the facts of each case.⁸⁷ Notice against trespass may be given in various ways,⁸⁸ such as by actual communication, posting, or fencing.⁸⁹ Adequate warnings of land or premises use restrictions can be communicated constructively through the use of physical barriers such as barricades, barriers, fences, and locks, which actually limit or bar access, or by signs at the entrance to the land or premises which inform the user of the restrictions which exist.⁹⁰

Some criminal trespass statutes require personal communication of the notice that the defendant's presence on the premises constitutes a trespass,⁹¹ or, of the lawful order to leave the premises,⁹² although a personal communication may be either oral or written,⁹³ such as by a sign.⁹⁴ For instance, a posted sign near the front doors of a university residence facility warning visitors that they must present identification to a security guard before entering, is a sufficient expression of the university's will in expressly warning intruders away from its property and is sufficient evidence that the defendant's attempt to enter the building constituted an unlawful entry onto university property.⁹⁵ It also has been held that notice not to enter or remain must be personally communicated only where the particular premises are open to the public.⁹⁶

Under other statutes, the act of remaining where notice prohibiting entry is posted is sufficient to constitute a trespass.⁹⁷ However, where all of the events of an alleged trespass took place in the parking lot, or in a common area of a

87. *People v Spencer* (1st Dist) 131 Ill App 2d 551, 268 NE2d 192.

Annotations: Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 ALR4th 773 § 3[b].

88. *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216.

89. *State v McCormack* (Fla App D3) 517 So 2d 73, 12 FLW 2862; *Commonwealth v Downing*, 511 Pa 28, 511 A2d 792.

As to unauthorized entry, generally, see § 187.

90. *State v McMechan* (Butler Co) 48 Ohio App 3d 261, 549 NE2d 211.

91. *State v Delgado*, 19 Conn App 245, 562 A2d 539; *State v Mention*, 12 Conn App 258, 530 A2d 645, certif den 205 Conn 809, 532 A2d 78; *In Interest of B.M.* (Fla App D4) 553 So 2d 714, 14 FLW 2790; *State v McCormack* (Fla App D3) 517 So 2d 73, 12 FLW 2862.

92. *People v Gudgel* (4th Dist) 183 Ill App 3d 881, 132 Ill Dec 651, 540 NE2d 391; *State v Dansinger* (Me) 521 A2d 685; *State v Chiapetta* (Me) 513 A2d 831; *State v O'Brien* (Mo App) 784 SW2d 187; *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ

144, 584 A2d 216; *Seattle v Rice*, 93 Wash 2d 728, 612 P2d 792; *State v Horn*, 139 Wis 2d 473, 407 NW2d 854.

As to the judicial construction of "lawful order," see § 175.

93. *Watson v State*, 63 Ala 19; *People v Gudgel* (4th Dist) 183 Ill App 3d 881, 132 Ill Dec 651, 540 NE2d 391; *State on behalf of J.A.V. (La)* 558 So 2d 214; *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831 ("persona non grata" letter).

The court declined to find that "personally communicated" requires actual individual service of notice to quit the premises where notice to quit was broadcast over the loudspeakers of five police cars and, thus, given in a manner reasonably calculated to give notice to all present. *State v Dupuy*, 118 NH 848, 395 A2d 851.

94. *Artisist v United States* (Dist Col App) 554 A2d 327.

95. *Artisist v United States* (Dist Col App) 554 A2d 327.

As to statutes expressly prohibiting trespass on school grounds, generally, see §§ 194 et seq.

96. *People v Segal*, 78 Misc 2d 944, 358 NYS2d 866.

97. *Downer v State* (Fla) 375 So 2d 840; *State*

building open to the public, and not inside any of the particular businesses within, the fact that there was a "no trespass" sign somewhere inside the building is of no substantial significance unless it is shown that a person violates the condition of being on the premises.⁸⁸

The crime of trespass on unposted land does not occur until after the trespasser is warned to depart and fails to do so.⁸⁹ But, where the complainant had marked his property against trespass in accord with the statutory requirements, notwithstanding the defendant's ignorance of the law and of the meaning of the marking, the defendant knowingly entered the property with legal notice that the land he entered was off limits to trespassers and was properly convicted of criminal trespass.¹

Practice guide: Where a criminal trespass statute provides that a person is guilty of criminal trespass when, knowing that he is not licensed or privileged to do so, he enters or remains in the building or other premises after an order to leave or not to enter has been personally communicated to him by the owner of the premises or another authorized person, the element of notification must be proved by the state beyond a reasonable doubt.²

§ 179. —Time of notice or warning

Under a statute prohibiting a person from entering or remaining in places or on land after being forbidden to do so, only after a reasonably contemporaneous request to leave has been made, such a request is reasonably contemporaneous if given a few hours prior to the arrest, the same day as the arrest, or such other prearrest interval reasonable under the facts and circumstances of each particular case.³ Where a prior warning is statutorily required to justify an arrest for trespass, if the arresting officer of a defendant convicted of trespass had substantial reason to believe that a prior warning had been issued in accordance with the statute, it is irrelevant and unnecessary that the officer was not present when the prior warning was issued where he was present during the trespass.⁴

Observation: A criminal trespass statute may provide for separate offenses where the only substantive difference between the offenses lies in the time of giving the notice; thus, criminal trespass may consist of entering and remaining where notice forbidding entry is given before the accused goes upon premises, or may deal with lawful entry and remaining on the premises after the defendant has been directed to leave.⁵

v Dansinger (Me) 521 A2d 685; Commonwealth v Hood, 389 Mass 581, 452 NE2d 188.

98. St. Louis County v Stone (Mo App) 776 SW2d 885.

99. In Interest of B.M. (Fla App D4) 553 So 2d 714, 14 FLW 2790.

1. State v Blalock, 232 Mont 223, 756 P2d 454.

2. State v Delgado, 19 Conn App 245, 562 A2d 539.

3. State on behalf of J.A.V. (La) 558 So 2d 214.

A former junior high school student, who

entered school premises although he had been told not to enter the premises on two prior occasions by a vice principal, did not violate a statute creating crime of trespass on buildings and grounds of public educational institutions where, although he had previously been warned not to be on school property, the defendant was not asked to leave school premises on day of his arrest. Re Appeal No. 631 (77) etc., 282 Md 223, 383 A2d 684.

4. State v Yunker (Fla App D5) 402 So 2d 591.

5. Strozier v State, 187 Ga App 16, 369 SE2d

Although a statute may legitimately criminalize an act of peaceful but unauthorized continued presence on public property for purposes other than those to which the property has been dedicated,⁶ a criminal trespass statute which is generally concerned with public property, and which makes refusing or failing to leave a public building or grounds upon being requested to do so by an authorized employee a criminal offense, limits the power of public officials only to notifying people, in specified circumstances, that they may not remain on the property and does not permit them to bar entry.⁷

■■■■ **Observation:** The fact that public officials do not immediately request a person to leave, even though he is inside a public building after it has been closed for the day, does not estop them from making a later request that the trespasser leave such building.⁸

§ 180. —Who may give notice or warning

Many criminal trespass statutes require that notice or warning be given to a person that his presence on the premises is a trespass,⁹ by the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant,¹⁰ that is, his agent,¹¹ or by a person lawfully in charge of the premises.¹²

Under a federal statute, which makes it a criminal offense for a person to

504.

6. § 189.

7. Re Appeal No. 631 (77) etc., 282 Md 223, 383 A2d 684.

8. Parrish v Municipal Court for Modesto Judicial Dist. (5th Dist) 258 Cal App 2d 497, 65 Cal Rptr 862.

9. § 177.

10. United States v Gilbert (ND Ga) 720 F Supp 1554, *affd* in part and *revd* in part (CA11 Ga) 920 F2d 878; State v Delgado, 19 Conn App 245, 562 A2d 539 (owner or authorized person); Corn v State (Fla) 332 So 2d 4 (lawful occupant); State v Yunker (Fla App D5) 402 So 2d 591 (custodian); Kerr v State, 193 Ga App 165, 387 SE2d 355 (facility administrator); Watson v State, 190 Ga App 671, 379 SE2d 811; Brooks v State, 170 Ga App 440, 317 SE2d 552; People v Gudgel (4th Dist) 183 Ill App 3d 881, 132 Ill Dec 651, 540 NE2d 391; State v Dansinger (Me) 521 A2d 685; State v Chiapetta (Me) 513 A2d 831; Re Appeal No. 631 (77) etc., 282 Md 223, 383 A2d 684 (authorized employee); State v Scholberg (Minn App) 395 NW2d 454 (lawful possessor); State v O'Brien (Mo App) 784 SW2d 187 (owner or authorized person); Binhoff v State, 49 Or 419, 90 P 586.

11. Woll v United States (Dist Col App) 570 A2d 819 (police officer); Hemmati v United States (Dist Col App) 564 A2d 739; State v McCormack (Fla App D3) 517 So 2d 73, 12 FLW 2862 (police officer).

Where a bartender told two police officers

that the defendant was unwanted and should leave the premises, and where the officers subsequently repeatedly told the defendant to leave because the bartender had requested his departure, such notice was sufficient under a statute requiring, for conviction for trespass, that a person remain in a building after receiving notice from the owner or occupant to depart. People v Gudgel (4th Dist) 183 Ill App 3d 881, 132 Ill Dec 651, 540 NE2d 391.

12. Hemmati v United States (Dist Col App) 564 A2d 739; State v Cargill, 100 Or App 336, 786 P2d 208, review *gr* 310 Or 133, 794 P2d 794.

For purposes of a criminal trespass statute providing that any person who shall refuse to quit premises on the demand of the lawful occupant or of the person lawfully in charge thereof shall be deemed guilty of a misdemeanor, a lessee of a clinic was the person lawfully in charge of the corridor leading to the clinic so that she could demand that the defendants leave the corridor. Woll v United States (Dist Col App) 570 A2d 819.

A former junior high school student, who entered the school premises although he had been told not to enter premises on two prior occasions by the vice principal, did not violate statute creating crime of trespass on buildings and grounds of public educational institutions, where the defendant had not been denied access to school by "highest official or governing body," the principal, as required by the statutes. Re Appeal No. 631 (77) etc., 282 Md 223, 383 A2d 684.

reenter a military base after having been ordered not to do so by a commanding officer, the order not to reenter a federal military base may be made by any officer in command or charge.¹³

Notice not to enter, given by the owner or landlord, is insufficient to bring a statute requiring notice from "one who has lawful control of the premises" into operation where a dwelling is in the possession of a subtenant¹⁴ or a tenant.¹⁵ Similarly, a tenant in an apartment complex has no authority to order a person not to enter the common areas of the apartment complex, such as a public lobby.¹⁶

More than one person can have the authority to order someone to leave either public or private premises; reasonableness is a factor in determining such authority.¹⁷ Thus, union representatives performing lawful union activity at a construction job site do not violate a criminal trespass statute in refusing to accede to an arbitrary request by the job site owner to leave the premises.¹⁸

Practice guide: Only if a defendant at trial for trespass challenges the authorization of one who posted notice of, or who otherwise communicated, a restriction on the use of public premises, is the prosecution required to prove the identity of the individual and his authority to restrict access to the portion of the public facility in question; otherwise, it is sufficient if the prosecutor establishes that defendant was on notice that he was not authorized to enter the portion of the public building in which the alleged trespass occurred.¹⁹

3. REQUIREMENT OF INTENT OR KNOWLEDGE [§§ 181-184]

§ 181. Knowledge

The common requirement of criminal trespass offenses is that the actor be aware of the fact that he is making an unwarranted intrusion,²⁰ and, in general, criminal trespass statutes require that the trespass be knowingly committed.²¹

13. § 193.

14. *Steele v State*, 191 Ind 350, 132 NE 739, 18 ALR 500.

15. *Commonwealth v Richardson*, 313 Mass 632, 48 NE2d 678, 146 ALR 648.

16. *State v Lo Sacco*, 12 Conn App 172, 529 A2d 1348.

17. *Woll v United States* (Dist Col App) 570 A2d 819.

18. *Re Catalano*, 29 Cal 3d 1, 171 Cal Rptr 667, 623 P2d 228, 106 BNA LRRM 2565, 94 CCH LC ¶ 55340.

19. *Downer v State* (Fla) 375 So 2d 840.

20. *Warfield v State*, 315 Md 474, 554 A2d 1238.

21. *United States v Gilbert* (ND Ga) 720 F Supp 1554, *affd in part and revd in part* (CA11 Ga) 920 F2d 878; *State v Delgado*, 19 Conn App 245, 562 A2d 539; *State v Mention*, 12 Conn App 258, 530 A2d 645, *certif den* 205

Conn 809, 532 A2d 78; *Corn v State* (Fla) 332 So 2d 4; *Bowman v State*, 258 Ga 829, 376 SE2d 187, *on remand* 191 Ga App 207, 382 SE2d 434; *Kerr v State*, 193 Ga App 165, 387 SE2d 355; *Watson v State*, 190 Ga App 671, 379 SE2d 811; *People v Mortenson* (2d Dist) 178 Ill App 3d 871, 128 Ill Dec 46, 533 NE2d 1134; *State on behalf of J.A.V.* (La) 558 So 2d 214; *State v Dansinger* (Me) 521 A2d 685; *State v O'Brien* (Mo App) 784 SW2d 187; *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, *certif den* 122 NJ 144, 584 A2d 216; *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831; *Commonwealth v Downing*, 511 Pa 28, 511 A2d 792; *Commonwealth v Walker*, 384 Pa Super 562, 559 A2d 579; *State v Cargill*, 100 Or App 336, 786 P2d 208, *review gr* 310 Or 133, 794 P2d 794; *Bader v State* (Tex App Corpus Christi) 777 SW2d 178; *Palmer v State* (Tex App Houston (1st Dist)) 764 SW2d 332; *State v Kreth*, 150 Vt 406, 553 A2d 554; *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, *review den* 110 Wash 2d 1034.

A statute provides that a person is guilty of

Where a statute provides in part that a person is guilty of simple trespass when, knowing that he is not licensed or privileged to do so, he enters any premises without intent to harm any property, the statutory language does not create a strict liability crime, but requires knowledge on the part of the accused that he is entering without license or privilege.²² Where a criminal trespass statute defines an offender as a person who knowingly and without authority remains upon the land or premises of another person, one charged with trespass cannot be convicted unless he is aware of his conduct, remaining after told to depart, and aware of the attendant circumstances, that he is on another's property, in order to meet the culpability required by the statute.²³ On the other hand, in the absence of evidence that the defendant knowingly entered store premises as a trespasser, there can be no trespass unless the possessor revoked the defendant's status as a business invitee.²⁴

■■■■ Observation: Some form of communication of any restrictions on the use of land to those entering it is essential to a successful trespass prosecution under a statute which provides that no person, without privilege to do so, shall knowingly enter or remain on the land or premises of another.²⁵

The knowledge requirement of criminal trespass statutes is designed primarily to exclude from criminal liability both the inadvertent trespasser and the trespasser who believes that he has received an express or implied permission to enter or remain.²⁶

■■■■ Practice guide: Where a statute requires that the actor have knowledge that the remaining is unlawful, the assertion by the prosecution that the defendants entered the premises lawfully but remained there unlawfully after being ordered to leave, standing alone, was insufficient where, under the circumstances, it was reasonable for the defendants to conclude that they had a license or privilege to be on the premises and such belief, even if mistaken, negated the element of "knowing unlawful remaining."²⁷

simple trespass when knowing that he is not licensed or privileged to do so, he enters any premises without intent to harm any property. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

22. *State v Mention*, 12 Conn App 258, 530 A2d 645, certif den 205 Conn 809, 532 A2d 78.

Where the record revealed that the defendant had been unequivocally informed and understood that his privilege to attend church services had been revoked, because he was allegedly bothering woman parishioners and using the church for personal meetings, there was ample evidence before the court that the defendant entered the church property, on the three occasions charged, as a knowing trespasser. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

Uncontradicted evidence that the defendant knew he was entering an area of a store where he had no right or permission to be is sufficient

to support a conviction for the offense of criminal trespass. *Milton v State* (Tex App Houston (14th Dist)) 751 SW2d 908, petition for discretionary review ref (Mar 8, 1989).

23. *Bowman v State*, 258 Ga 829, 376 SE2d 187, on remand 191 Ga App 207, 382 SE2d 434.

24. *State v Mention*, 12 Conn App 258, 530 A2d 645, certif den 205 Conn 809, 532 A2d 78.

25. § 177.

26. *Warfield v State*, 315 Md 474, 554 A2d 1238.

27. *People v Ranieri* (4th Dept) 144 App Div 2d 1006, 534 NYS2d 287, app den 73 NY2d 895, 538 NYS2d 807, 535 NE2d 1347 and app den 73 NY2d 895, 538 NYS2d 807, 535 NE2d 1347 (defendants went to the residence of their daughter and son-in-law to pick up their granddaughter for purposes of exercising court ordered visitation rights).

§ 182. Intent

Where a statute criminalizes trespass, without the criminal intent a defendant commits no criminal trespass.²⁸ Even where the statute is silent as to intent, criminal intent is an essential element of the statutory offense of trespass.²⁹ Thus, in order to show a criminal trespass, it is necessary that it be shown that there was an intent to do an act which was in violation of the statute, as distinguished from a civil trespass or injury which may be a result of negligence.³⁰

One need not intend the result that occurred to be found guilty of knowingly committing the crime of trespass.³¹ However, one need not intend the result that occurred to be found guilty of knowingly committing the crime of trespass³² and, in fact, some statutes expressly provide that a person is guilty of simple trespass when, knowing that he is not licensed or privileged to do so, he enters any premises without intent to harm any property.³³

Under a federal statute, which makes it a criminal offense for a person to reenter a military base after having been ordered not to do so by a commanding officer, there is no requirement that the government prove improper motive or intent.³⁴

§ 183. —Requirement as to general or specific intent

Unlawful entry, or criminal trespass, does not require the specific intent to commit a particular crime.³⁵ It is the absence of that very intent which principally distinguishes trespass or unlawful entry from other crimes, such as burglary.³⁶

General malice or criminal intent, rather than specific intent, is sufficient to sustain a conviction for trespass.³⁷

|||| Practice guide: Where a statute in force at the time of arrest required that the state prove that the purported trespasser entered and refused to leave the property “willfully,” rather than “knowingly” as required by a subsequent statute, both statutes required the state to prove a specific intent.³⁸

28. *Reed v Commonwealth*, 6 Va App 65, 366 SE2d 274.

29. *State v Larason* (CP) 75 Ohio L Abs 211, 143 NE2d 502; *Reed v Commonwealth*, 6 Va App 65, 366 SE2d 274.

30. *White v Mississippi Power & Light Co.* (Miss) 196 So 2d 343, 30 ALR3d 754.

As to the intent necessary to commit a civil trespass, see §§ 9 et seq.

31. *State v Blalock*, 232 Mont 223, 756 P2d 454.

32. *State v Blalock*, 232 Mont 223, 756 P2d 454.

33. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319.

34. § 193.

35. *Williams v United States* (Dist Col App) 549 A2d 328; *State v Blalock*, 232 Mont 223, 756 P2d 454.

For discussion of specific intent, generally, see 21 Am Jur 2d, Criminal Law § 130.

36. *Williams v United States* (Dist Col App) 549 A2d 328.

37. *State v Champa* (RI) 494 A2d 102.

The only state of mind of a defendant, charged with unlawful entry onto university premises, that the government had to prove was the defendant's general intent to be on the premises contrary to the will of the lawful owner. *Artisist v United States* (Dist Col App) 554 A2d 327.

38. *Bowman v State*, 258 Ga 829, 376 SE2d 187, on remand 191 Ga App 207, 382 SE2d 434.

§ 184. —Effect of claim of right, license, or privilege to be on property; mistaken claims

Criminal trespass statutes make it unlawful to enter the property of another without a claim of right,³⁹ license, or privilege.⁴⁰ For instance, a person may be guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters any structure that is locked or barred, or any place from which he may lawfully be excluded and which is posted in a manner prescribed by law and in a manner reasonably likely to come to the attention of intruders, or which is fenced or otherwise enclosed in the manner designed to exclude intruders.⁴¹

If a defendant has a claim of right to be on certain property, he lacks the criminal intent to trespass thereon.⁴² Just as, in a case of theft of personalty, a conviction cannot be upheld if ownership of the property is disputed between the complaining witness and the defendant, the application of such a rule is appropriate where the right to access to the property is in dispute in a criminal trespass conviction.⁴³ Thus, it is an affirmative defense to prosecution for criminal trespass that the actor reasonably believed that the owner of the premises would have licensed him to enter, so long as the actor's belief is reasonable, that is, one which the actor is neither reckless nor negligent in holding.⁴⁴

If the act prohibited is committed in good faith under claim of right or color of title, although the accused is mistaken as to his right, unless it is committed with force or violence of a breach of the peace, no conviction will lie, since it will not be presumed that the legislature intended to punish criminal acts committed in ignorance, by accident or under claim of right, and in the bona fide belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction.⁴⁵ For instance, having been ordered from a private place, one's belief that he is standing on public property from which he has not been ordered to move by public authority may negate the requisite intent for criminal trespass.⁴⁶

39. *State v Scholberg* (Minn App) 395 NW2d 454.

40. *State v Delgado*, 19 Conn App 245, 562 A2d 539; *State v McCormack* (Fla App D3) 517 So 2d 73, 12 FLW 2862; *State v Dansinger* (Me) 521 A2d 685; *State v O'Brien* (Mo App) 784 SW2d 187.

41. *State v Dansinger* (Me) 521 A2d 685.

In a prosecution for trespass in a structure, the evidence was sufficient to sustain a jury finding that a group of women conducting an "inspection" of maternity facilities at a hospital were on notice of the restriction on entry into the postpartum area where several signs to that effect were posted, despite testimony that the women either did not see or did not read the signs. *Downer v State* (Fla) 375 So 2d 840.

A person who knows that he is not licensed or privileged to enter a place as to which notice against trespass is given by actual communication, posting, or fencing is guilty of trespass. *Commonwealth v Downing*, 511 Pa

28, 511 A2d 792; *State v McCormack* (Fla App D3) 517 So 2d 73, 12 FLW 2862.

42. *State v Scholberg* (Minn App) 395 NW2d 454.

As to common law defenses to trespass, generally, including the defense of necessity, see §§ 74 et seq.

For discussion of statutory defenses to statutory criminal trespass, see § 80.

43. *Hann v State* (Tex App Fort Worth) 771 SW2d 731.

44. § 80.

45. *State v Larason* (CP) 75 Ohio L Abs 211, 143 NE2d 502; *Reed v Commonwealth*, 6 Va App 65, 366 SE2d 274.

As to the significance of title or color of title, generally, in an action for trespass, see §§ 39 et seq.

46. *Hope v State*, 193 Ga App 202, 387 SE2d 414.

4. CONDUCT PROHIBITED [§§ 185-191]

§ 185. Generally

Certain acts of trespass are punishable as crimes particularly when the act is accompanied by willfulness, force, or malice.⁴⁷ A criminal trespass statute may prohibit two distinct kinds of conduct, such as entry upon land with notice that such entry is prohibited⁴⁸ as well as remaining upon land after notice is given to depart, without regard to the lawfulness of the initial entry.⁴⁹ Further, statutes may distinguish between trespass, generally, and trespass in a particular place, such as trespass in a parking lot,⁵⁰ or on school premises.⁵¹ Statutes also may distinguish between forcible trespass and trespass after being forbidden to do so.⁵²

Not every trespass which is the subject of a civil action is an indictable offense.⁵³

§ 186. Breach of peace

A mere trespass to real property is not a crime at common law unless it amounts to a breach of the peace.⁵⁴ The law of criminal trespass is a field quite distinct and separate from civil trespass, and unless a trespass is committed under such circumstances as to constitute an actual breach of the peace, it is not indictable at common law, but is to be redressed by a civil action only.⁵⁵

Every trespass which is a disturbance of the peace is indictable.⁵⁶

To constitute the offense of criminal trespass, intentional acts must be used, or a willful demonstration of force calculated to intimidate or alarm, or acts involving or tending to a breach of the peace.⁵⁷ For instance, statutes sometimes provide that a person commits a trespass who, having departed from the land or premises of another, after warning, remains about in the vicinity, using profane or indecent language.⁵⁸

47. *Thompson v State*, 67 Ala 106; *Owens v Atkins*, 163 Ark 82, 259 SW 396, 34 ALR 267; *People v Calandrillo* (2d Dept) 134 App Div 2d 271, 520 NYS2d 604, app den 70 NY2d 1004, 526 NYS2d 939, 521 NE2d 1082 (trespass in possession of deadly weapon); *State v McAlister*, 59 NC App 58, 295 SE2d 501, petition den 307 NC 471, 299 SE2d 226 (forcible trespass).

As to force as an element of trespass, generally, and as to forcible entry with respect to civil trespass, see, respectively, §§ 13, 32 et seq.

48. § 187.

49. § 189.

50. *Fardig v Anchorage* (Alaska App) 785 P2d 911, adhered to, on reh (Alaska App) 803 P2d 879.

51. §§ 194 et seq.

52. *State v McAlister*, 59 NC App 58, 295 SE2d 501, petition den 307 NC 471, 299 SE2d 226.

As to statutory notice or warning requirements, see § 177.

53. *Bouie v Columbia*, 378 US 347, 12 L Ed 2d 894, 84 S Ct 1697; *White v Mississippi Power & Light Co.* (Miss) 196 So 2d 343, 30 ALR3d 754.

54. *Re Appeal No. 631* (77) etc., 282 Md 223, 383 A2d 684.

55. *Bouie v Columbia*, 378 US 347, 12 L Ed 2d 894, 84 S Ct 1697.

As to breach of peace as criminal trespass, generally, see 12 Am Jur 2d, Breach of Peace § 9.

56. *Owens v Atkins*, 163 Ark 82, 259 SW 396, 34 ALR 267; *White v Mississippi Power & Light Co.* (Miss) 196 So 2d 343, 30 ALR3d 754; *State v Wheeler*, 3 Vt 344.

Forcible entry or detainer as criminal offense, see 35 Am Jur 2d, Forcible Entry and Detainer §§ 58, 59.

57. *White v Mississippi Power & Light Co.* (Miss) 196 So 2d 343, 30 ALR3d 754; *Adams v Freeman*, 12 Johns (NY) 408; *State v Mills*, 104 NC 905, 10 SE 676; *State v Wheeler*, 3 Vt 344.

58. *Corn v State* (Fla) 332 So 2d 4.

A trespass committed with threats of force, or by a show of strength of a multitude of people, constitutes forcible trespass as defined by a statute.⁵⁹ Even though an entry on premises is effected peaceably, if thereafter violent and abusive language is used and acts done reasonably calculated to intimidate or lead to a breach of the peace, the entrant is guilty of forcible trespass,⁶⁰ although there is authority for an opposite view.⁶¹

A criminal trespass statute which makes it an offense to unlawfully enter upon the premises of another with force amounting to a breach of the peace, or such as is calculated to produce a breach of the peace, is not broad enough to encompass property which is owned and operated by a governmental entity and is open to the public.⁶²

§ 187. Unauthorized entry

Although a criminal trespass statute may prohibit two distinct kinds of conduct such as entry upon land with notice that such entry is prohibited,⁶³ as well as remaining upon land after notice is given to depart, without regard to the lawfulness of the initial entry,⁶⁴ the basic element of the crime of criminal trespass is an unprivileged entry.⁶⁵

Criminal trespass statutes make it unlawful to enter the property of another or, after having been forbidden to do so, to instigate or encourage others to enter the property of another knowing that such persons have been forbidden to do so, and to enter the property of another for the purpose of damaging such property or interfering with the rights of the owner, user, or occupant of such property.⁶⁶

59. *State v McAlister*, 59 NC App 58, 295 SE2d 501, petition den 307 NC 471, 299 SE2d 226.

60. *State v Tyndall*, 192 NC 559, 135 SE 451, 49 ALR 596.

In a prosecution for trespass with a firearm and for battery, the instantaneousness of the transaction coupled with the consistent aggressive and assaultive conduct of defendant firmly established an inference of nonconsensual entry, even though defendant testified that he was invited onto the premises. *Firestone v State* (Fla App D4) 407 So 2d 1070, petition den (Fla) 415 So 2d 1359.

61. *State v Hawkins*, 125 NC 690, 34 SE 537.

62. *State v Brooks* (Tenn Crim) 741 SW2d 920.

63. *State v Steinmann*, 20 Conn App 599, 569 A2d 557, app den 214 Conn 806, 573 A2d 319; *State v Delgado*, 19 Conn App 245, 562 A2d 539; *Corn v State* (Fla) 332 So 2d 4; *State v McCormack* (Fla App D3) 517 So 2d 73, 12 FLW 2862; *People v Mortenson* (2d Dist) 178 Ill App 3d 871, 128 Ill Dec 46, 533 NE2d 1134; *State on behalf of J.A.V. (La)* 558 So 2d 214; *Commonwealth v Richardson*, 313 Mass 632, 48 NE2d 678, 146 ALR 648; *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216; *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831; *Commonwealth v Down-*

ing, 511 Pa 28, 511 A2d 792; *Commonwealth v Walker*, 384 Pa Super 562, 559 A2d 579; *State v Cargill*, 100 Or App 336, 786 P2d 208, review gr 310 Or 133, 794 P2d 794; *Bader v State* (Tex App Corpus Christi) 777 SW2d 178; *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

A teacher committed a criminal trespass by entering a school closed by the principal during a teachers' strike, where he entered through a basement window for the purpose of unlocking the doors and admitting his allies. *People v Horelick*, 30 NY2d 453, 334 NYS2d 623, 285 NE2d 864, cert den 410 US 943, 35 L Ed 2d 610, 93 S Ct 1372.

As to the statutory requirement of notice or warning, generally, see § 177.

64. § 189.

65. *Commonwealth v Thomas*, 522 Pa 256, 561 A2d 699.

66. *NOW v Operation Rescue* (DC Dist Col) 726 F Supp 300, adhered to (DC Dist Col) 1989 US Dist LEXIS 13864, later proceeding (ED Va) 726 F Supp 1483, later proceeding (DC Dist Col) 1990 US Dist LEXIS 9880, amd, rereported (DC Dist Col) 1990 US Dist LEXIS 9517, later proceeding (DC Dist Col) 1990 US Dist LEXIS 9487, amd, rereported (DC Dist Col) 1990 US Dist LEXIS 9901, and later op (DC Dist Col) 1990 US Dist LEXIS 9939.

■■■■ *Observation:* Where a defendant is charged with trespassing after his entry was forbidden, refusal to leave is not a necessary element, and the defendant's argument that in order to support a conviction for trespass, the prosecutor was required to prove that the defendant was given an opportunity to leave the premises but refused, was without merit.⁶⁷

§ 188. —Structure or building; dwelling place

A person commits the crime of trespass if he knowingly and unlawfully enters a building, a habitable structure, or upon real property.⁶⁸ Where a statute criminalizes the unlicensed entry of structures, and another statute expressly defines what is a structure, the type of premises entered is critical, because unless such a structure is involved, there can be no offense of criminal trespass.⁶⁹ A garage is a "building" under such a statute,⁷⁰ but fenced-in areas are not.⁷¹ A parking lot is not a "structure" within the meaning of a statute which prohibits the unlicensed entry of a structure.⁷²

A trespass statute expressly applying to "any private residence, house, or building of another," applies to a shopping mall, notwithstanding its quasi-public nature, since the commercial mall is a privately owned building to which the public has been invited to come, to look, and to buy, and the invitation presupposes that the conduct of persons coming there will be in keeping with such purposes, not in behavior which could be a financial detriment to all of the store owners in the mall, inasmuch as the statute in question was passed to assist the property owner in the protection of his property.⁷³

The gravamen of the offense of home invasion is unauthorized entry of a dwelling place.⁷⁴ For instance, a criminal trespass statute provides that a person who enters a dwelling house, whether or not a person is actually present, knowing that he is not licensed or privileged to do so shall be imprisoned or fined or both.⁷⁵ It is the purpose for which a structure is used, rather than the nature of the structure, that determines whether it is a "dwelling place" within the meaning of a statute criminalizing unlawful or

67. *People v Bell*, 182 Mich App 181, 451 NW2d 542.

68. *State v O'Brien* (Mo App) 784 SW2d 187; *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831.

The crime of criminal trespass is committed when a person enters a building or occupied structure knowing that he is not licensed to do so. *Commonwealth v Thomas*, 522 Pa 256, 561 A2d 699.

69. *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216.

70. *People v Schmid* (3d Dept) 124 App Div 2d 896, 508 NYS2d 314.

71. *State v Brown*, 50 Wash App 873, 751 P2d 331.

72. *State in Interest of L.E.W.*, 239 NJ Super

65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216.

73. *Corn v State* (Fla) 332 So 2d 4.

74. *People v Ader* (2d Dist) 176 Ill App 3d 613, 126 Ill Dec 112, 531 NE2d 407.

75. *State v Kreth*, 150 Vt 406, 553 A2d 554.

A statute providing that a person who is not a peace officer acting in the line of duty commits a home invasion when, without authority, he or she knowingly enters a dwelling place of another, when he or she knows or has reason to know that one or more persons is present and intentionally causes any injury to any person or persons within such dwelling place, applies to a defendant who apparently entered a home with permission and with authority, but subsequently exceeded such authority when he shot and stabbed the resident. *People v Bruce* (5th Dist) 185 Ill App 3d 356, 133 Ill Dec 497, 541 NE2d 708, app den 129 Ill 2d 566, 140 Ill Dec 674, 550 NE2d 559.

unauthorized and knowing entry into a dwelling place.⁷⁶ Thus, a criminal trespass statute prohibiting the unauthorized entry of any "noncommercial dwelling house, apartment, or other such place" indicates a legislative intent to protect against unauthorized entry of structures of the most private character, that is, places of habitation, and does not refer to a shed used for hobby activities.⁷⁷ To construe the more general provision "or other such place" as extending the force of the statute to nonresidential structures would be inconsistent with the legislative intent to protect persons in their homes, in that a penalty could be imposed for an unauthorized entry of any noncommercial structure even though no substantial occupation occurred.⁷⁸

A home invasion statute requiring that the offender intentionally cause injury to any person or persons within the dwelling place does not require that the injury occur within the dwelling if the defendant, in invading the dwelling place flushes the resident out and causes injury in an immediate sequence within the area of the dwelling.⁷⁹ Nor does it require a showing of the use or threat of force after entry is gained since the complete offense of home invasion comprises conduct both inside and outside the dwelling.⁸⁰ Further, the mere fact that one has not locked or even closed the outside door to one's residence in the middle of a summer day does not constitute an invitation to a perfect stranger to commit a home invasion.⁸¹

§ 189. Unlawful remaining

Remaining on the property or premises of another unlawfully or without authority is a criminal trespass,⁸² particularly after the defendant has been told to leave⁸³ by the the owner, rightful occupant, or, upon proper identification,

76. *People v Frisby* (1st Dist) 160 Ill App 3d 19, 111 Ill Dec 700, 512 NE2d 1337.

77. *Re L.* (1st Dist) 82 Cal App 3d 123, 147 Cal Rptr 54.

78. *Re L.* (1st Dist) 82 Cal App 3d 123, 147 Cal Rptr 54.

As to construction of criminal trespass statutes, generally, see §§ 167 et seq.

79. *People v Kolls* (2d Dist) 179 Ill App 3d 652, 128 Ill Dec 491, 534 NE2d 673, app den 126 Ill 2d 564, 133 Ill Dec 674, 541 NE2d 1112.

80. *People v Troutt* (5th Dist) 172 Ill App 3d 668, 122 Ill Dec 517, 526 NE2d 910, app den 123 Ill 2d 565, 128 Ill Dec 898, 535 NE2d 409.

81. *People v Simpson* (3d Dist) 178 Ill App 3d 1091, 128 Ill Dec 197, 534 NE2d 217, app den 126 Ill 2d 565, 133 Ill Dec 675, 541 NE2d 1113.

82. *NOW v Operation Rescue* (DC Dist Col) 726 F Supp 300, adhered to (DC Dist Col) 1989 US Dist LEXIS 13864, later proceeding (ED Va) 726 F Supp 1483, later proceeding (DC Dist Col) 1990 US Dist LEXIS 9880, amd, rereported (DC Dist Col) 1990 US Dist LEXIS 9517, later proceeding (DC Dist Col) 1990 US Dist LEXIS 9487, amd, rereported (DC Dist Col) 1990 US Dist LEXIS 9901, and later op

(DC Dist Col) 1990 US Dist LEXIS 9939; *United States v Gilbert* (ND Ga) 720 F Supp 1554, affd in part and revd in part (CA11 Ga) 920 F2d 878; *State v Delgado*, 19 Conn App 245, 562 A2d 539; *Woll v United States* (Dist Col App) 570 A2d 819; *Downer v State* (Fla) 375 So 2d 840; *Corn v State* (Fla) 332 So 2d 4; *Strozier v State*, 187 Ga App 16, 369 SE2d 504; *People v Gudgel* (4th Dist) 183 Ill App 3d 881, 132 Ill Dec 651, 540 NE2d 391; *State on behalf of J.A.V.* (La) 558 So 2d 214; *Re Appeal No. 631* (77) etc., 282 Md 223, 383 A2d 684; *State v O'Brien* (Mo App) 784 SW2d 187; *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831; *State v Cargill*, 100 Or App 336, 786 P2d 208, review gr 310 Or 133, 794 P2d 794; *Commonwealth v Walker*, 384 Pa Super 562, 559 A2d 579; *Bader v State* (Tex App Corpus Christi) 777 SW2d 178; *Reed v Commonwealth*, 6 Va App 65, 366 SE2d 274; *Sunnyside v Lopez*, 50 Wash App 786, 751 P2d 313, review den 110 Wash 2d 1034.

83. *NOW v Operation Rescue* (DC Dist Col) 726 F Supp 300, adhered to (DC Dist Col) 1989 US Dist LEXIS 13864, later proceeding (ED Va) 726 F Supp 1483, later proceeding (DC Dist Col) 1990 US Dist LEXIS 9880, amd, rereported (DC Dist Col) 1990 US Dist LEXIS 9517, later proceeding (DC Dist Col) 1990 US Dist LEXIS 9487, amd, rereported (DC Dist

an authorized representative of the owner or rightful occupant, or by a person lawfully in charge of the premises.⁸⁴

Even where the entry was privileged or with consent, the owner, or one in lawful possession of property, has the right to determine whom to invite, the scope of the invitation, and the circumstances under which the invitation may be revoked.⁸⁵ For instance, although the complaining witness lived in an apartment with common entrance ways and halls, where the witness stated that the defendant was in her apartment when she made repeated requests for him to leave, the evidence was sufficient for a rational trier of fact to find the defendant guilty of criminal trespass beyond a reasonable doubt.⁸⁶

Criminal prosecution for trespass is permissible where a tenant, without justification, fails to pay rent and holds over.⁸⁷

■■■■ Observation: A statute permitting criminal liability for a tenant who willfully and unnecessarily holds over after expiration of a statutory notice to vacate the premises for nonpayment of rent is not unconstitutional because it is not the least restrictive method available to attain a legitimate legislative purpose, although an analogous civil remedy is available to the landlord, since the right to hold over is not a fundamental liberty.⁸⁸

§ 190. —Public or quasi-public property

Notwithstanding that when a property is open to the public at the time of an alleged trespass, the accused is presumed to have a license and privilege to be present,⁸⁹ a statute which provides that a person commits a criminal trespass when he knowingly and without authority remains upon the land or premises of another person after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant to depart, applies with equal force to publicly owned property.⁹⁰

■■■■ Practice guide: Where the property in question was open to the public at the time of the alleged trespass, the accused is presumed to have

Col) 1990 US Dist LEXIS 9901, and later op (DC Dist Col) 1990 US Dist LEXIS 9939; *United States v Gilbert* (ND Ga) 720 F Supp 1554, *affd* in part and *revd* in part (CA11 Ga) 920 F2d 878; *State v Delgado*, 19 Conn App 245, 562 A2d 539; *Downer v State* (Fla) 375 So 2d 840; *Corn v State* (Fla) 332 So 2d 4; *Watson v State*, 190 Ga App 671, 379 SE2d 811; *People v Gudgel* (4th Dist) 183 Ill App 3d 881, 132 Ill Dec 651, 540 NE2d 391; *People v Mortenson* (2d Dist) 178 Ill App 3d 871, 128 Ill Dec 46, 533 NE2d 1134; *State on behalf of J.A.V. (La)* 558 So 2d 214; *State v Dansinger (Me)* 521 A2d 685; *State v Chiapetta (Me)* 513 A2d 831; *Re Appeal No. 631 (77)* etc., 282 Md 223, 383 A2d 684; *State v Scholberg* (Minn App) 395 NW2d 454; *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, *certif den* 122 NJ 144, 584 A2d 216; *Bader v State* (Tex App Corpus Christi) 777 SW2d 178.

A teacher refusing to leave school premises

upon order of the school principal is a criminal trespasser within the meaning of a statute prohibiting one from remaining upon land after receiving notice to depart. *People v Spencer* (1st Dist) 131 Ill App 2d 551, 268 NE2d 192.

84. § 177.

85. § 49.

86. *Strozier v State*, 187 Ga App 16, 369 SE2d 504.

87. *Duhon v State*, 299 Ark 503, 774 SW2d 830.

88. *Duhon v State*, 299 Ark 503, 774 SW2d 830.

89. § 214.

90. *United States v Gilbert* (ND Ga) 720 F Supp 1554, *affd* in part and *revd* in part (CA11 Ga) 920 F2d 878.

a license and privilege to be present and the state has the burden of proving that the defendant was present in defiance of a lawful order.⁹¹

A statute may legitimately criminalize an act of peaceful but unauthorized continued presence on public property for purposes other than those to which the property has been dedicated,⁹² and, may limit the power of public officials only to notifying people, in specified circumstances, that they may not remain on the property, without permitting them to bar entry.⁹³ Prohibitions against trespass upon real property after warning apply not only to privately-owned property but also to "quasi-public" property such as a commercial shopping mall.⁹⁴

Practice guide: In general, unless a defendant challenges the authority of one who posted notice of, or who otherwise communicated, a restriction on the use of public premises, it is sufficient if the prosecutor establishes that defendant was on notice that he was not authorized to enter the portion of the public building in which the alleged trespass occurred.⁹⁵

In the face of actual notice, the public nature of the premises makes no difference unless the defendant's constitutional rights are in some way impaired.⁹⁶

Observation: A person who remains in a public building in violation of a criminal trespass law requiring him to vacate such building upon proper request, is not excused by the fact that at the time of the trespass he was doing what he thought was a good deed in the public interest.⁹⁷

A federal statute, which makes it a criminal offense for a person to reenter a military base after having been ordered not to do so by a commanding officer applies to a base that is open to the general public.⁹⁸

§ 191. Unauthorized access to computer

A statute provides that a person is guilty of computer trespass in the first degree if the person, without authorization, intentionally gains access to the computer system or electronic data base of another, and the access is made with the intent to commit another crime or the violation involves a computer or data base maintained by government agency.⁹⁹ The actus reas of the computer trespass statute is accessing a computer without authorization, not the unauthorized use of computer data.¹

91. *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831.

92. *United States v Gilbert* (ND Ga) 720 F Supp 1554, *affd in part and revd in part* (CA11 Ga) 920 F2d 878; *Brooks v State*, 170 Ga App 440, 317 SE2d 552.

93. § 179.

94. *Corn v State* (Fla) 332 So 2d 4.

Defendants, by taking part in a silent vigil in the offices of the Archdiocese of Chicago, and later in an elevator corridor immediately outside the offices, were properly charged with trespass where the premises in question were only accessible to the public to such a limited

extent and for such a limited purpose that the court did not believe it to be "open to the public" within the meaning of the ordinance. *Chicago v Rosser*, 47 Ill 2d 10, 264 NE2d 158.

95. § 180.

96. § 172.

97. *Parrish v Municipal Court for Modesto Judicial Dist.* (5th Dist) 258 Cal App 2d 497, 65 Cal Rptr 862.

98. § 193.

99. *State v Olson*, 47 Wash App 514, 735 P2d 1362.

1. *State v Olson*, 47 Wash App 514, 735 P2d 1362.

Definition: For purposes of a computer trespass statute, based on a person's intentionally gaining access to a computer system without authorization, access means to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, directly or by electronic means.²

5. STATUTORY PROHIBITIONS AS TO PARTICULAR PROPERTY AND PREMISES [§§ 192-199]

a. TRESPASS ON FEDERAL LANDS AND FEDERALLY REGULATED FACILITIES [§§ 192, 193]

§ 192. Federal lands; nuclear power facility

Various federal statutes prohibit trespasses upon federal lands,³ such as national parks,⁴ national forest lands,⁵ Indian and public land,⁶ submerged lands,⁷ and federally regulated facilities, such as nuclear power installations.⁸

§ 193. Military installation

A federal statute penalizes entry upon a military installation for a purpose prohibited by law or lawful regulation and, further, penalizes any presence or re-entry upon such an installation after removal therefrom or an order from the commanding officer not to re-enter.⁹ The order not to reenter may be made by any officer in command or charge.¹⁰ And, it is not necessary that the government justify the issuance of the exclusionary order, in order to sustain a conviction for a violation of such reentry provision.¹¹ The commanding officer of a military base has wide discretion as to whom to exclude from a military base, which will only be disturbed upon a showing that the ground for exclusion was patently arbitrary and discriminatory.¹²

Under the federal statute, the government must prove that it had absolute

2. *State v Olson*, 47 Wash App 514, 735 P2d 1362.

3. **Caution:** No attempt is made here to collect and analyze all of the many trespass statutes which apply to various federal lands and installations. The reader is advised to consult federal statutes for particular provisions.

4. 16 USCS §§ 21-23, 41, 43, 61, 78, 91, 92, 122, 161, 201 (trespass provisions respecting specific national parks).

5. 18 USCS § 1863.

6. 28 USCS §§ 2415, 2416.

As to trespass upon public lands, generally, see 63A Am Jur 2d, Public Lands § 128.

7. 48 USCS § 1710.

8. 42 USCS § 2278a.

As to trespass on nuclear power, or atomic energy, installations, generally, see 6 Am Jur 2d, Atomic Energy § 37.

9. 18 USCS § 1382.

Observation: A "purpose prohibited by law," as required by 18 USCS § 1382, may

sometimes be established by reference to state law. *United States v Patz* (CA9 Wash) 584 F2d 927.

For discussion of First Amendment implications of a statute prohibiting trespass on military installations, see § 171.

As to a definition of a military base, see 53 Am Jur 2d, Military, and Civil Defense § 4.

10. *United States v Albertini*, 472 US 675, 86 L Ed 2d 536, 105 S Ct 2897, on remand (CA9 Hawaii) 783 F2d 1484, later proceeding (CA9 Hawaii) 830 F2d 985.

11. *United States v Jelinski* (CA5 Tex) 411 F2d 476, cert den 396 US 943, 24 L Ed 2d 245, 90 S Ct 380; *Weissman v United States* (CA10 Okla) 387 F2d 271.

Annotations: Validity, construction, and application of 18 USCS § 1382, prohibiting trespass on military installation, 12 ALR Fed 638 § 10.

12. *United States v May* (CA9 Wash) 622 F2d 1000, 6 Fed Rules Evid Serv 1052, cert den 449 US 984, 66 L Ed 2d 247, 101 S Ct 402.

ownership or an exclusive right to the possession of the property upon which the alleged violation occurred,¹³ although best evidence is not required.¹⁴

Unlike common law trespass, the federal statute prohibiting trespass on federal military installations requires that the initial entry be made for a prohibited purpose, but the purpose may be the unauthorized entry itself, where the defendant knows that his entry is unauthorized.¹⁵ There is no requirement that the government prove improper motive or intent.¹⁶ Reentry of a military base, contrary to the commander's order, is a clear violation of the statute, notwithstanding the person's motives.¹⁷ Intent may be inferred from the circumstances.¹⁸ For instance, perimeter warning signs and repeated verbal warnings by numerous military police that entry is prohibited and illegal sustains the conclusion that protesters who entered the base despite receiving warnings and reading the signs did so with the deliberate intention of committed prohibited acts.¹⁹

Independent of any criminal trespass statutes, the commanding officer of a military installation has the right to summarily exclude civilians from the installation without giving notice or affording a hearing.²⁰

■■■■ Observation: Prosecution under the federal statute does not offend due process requirements where the defendant had actual notice of the prohibition against entry of the military installation.²¹ With respect to what constitutes actual notice, the defendants had actual notice that entry of a military base was without the permission of the commander and unlawful, where a sign to that effect was posted, five security guards were present at the entrance, and the installation was surrounded by a fence.²²

b. TRESPASS ON SCHOOL PREMISES [§§ 194-199]

§ 194. Generally

In many jurisdictions, statutes and ordinances forbid unauthorized persons

13. United States v Mowat (CA9 Hawaii) 582 F2d 1194, cert den 439 US 967, 58 L Ed 2d 426, 99 S Ct 458; United States v Quinones (CA1 Puerto Rico) 516 F2d 1309, cert den 423 US 852, 46 L Ed 2d 76, 96 S Ct 97; United States v Packard (ND Cal) 236 F Supp 585, affd (CA9 Cal) 339 F2d 887; United States v Watson (DC Va) 80 F Supp 649.

Annotations: Validity, construction, and application of 18 USCS § 1382, prohibiting trespass on military installation, 12 ALR Fed 637 § 5.

14. United States v Quinones (CA1 Puerto Rico) 516 F2d 1309, cert den 423 US 852, 46 L Ed 2d 76, 96 S Ct 97.

15. United States v Cottier (CA9 Mont) 759 F2d 760.

16. United States v Albertini, 472 US 675, 86 L Ed 2d 536, 105 S Ct 2897, on remand (CA9 Hawaii) 783 F2d 1484, later proceeding (CA9 Hawaii) 830 F2d 985; United States v Floyd (CA10 Okla) 477 F2d 217, cert den 414 US 1044, 38 L Ed 2d 336, 94 S Ct 550.

Proof of specific intent is not necessary for

conviction under 18 USCS § 1382. United States v Mowat (CA9 Hawaii) 582 F2d 1194, cert den 439 US 967, 58 L Ed 2d 426, 99 S Ct 458.

Annotations: 12 ALR Fed 638 § 6.

17. United States v Bowers (ND NY) 590 F Supp 307.

18. United States v Floyd (CA10 Okla) 477 F2d 217, cert den 414 US 1044, 38 L Ed 2d 336, 94 S Ct 550.

19. United States v Hall (CA9 Ariz) 742 F2d 1153.

20. United States v Jelinski (CA5 Tex) 411 F2d 476, cert den 396 US 943, 24 L Ed 2d 245, 90 S Ct 380; Weissman v United States (CA10 Okla) 387 F2d 271.

Annotations: 12 ALR Fed 638 § 3.

21. United States v Mowat (CA9 Hawaii) 582 F2d 1194, cert den 439 US 967, 58 L Ed 2d 426, 99 S Ct 458.

22. United States v Floyd (CA10 Okla) 477 F2d 217, cert den 414 US 1044, 38 L Ed 2d 336, 94 S Ct 550.

to enter or remain upon school premises.²³ For instance, a statute provides that any person who comes into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, without lawful business thereon, and whose presence or acts interfere with peaceful conduct of the activities of the school would disrupt the school or its pupils or school activities, is guilty of a misdemeanor if he or she remains there after being asked to leave by the chief administrative official of that school.²⁴ Further, criminal trespass statutes may expand the protection otherwise afforded the public's property interest in its educational facilities and insure that the pursuit of authorized educational activities, as well as the property itself, will be free from unauthorized invasion; thus, such statutes may protect college campuses from unauthorized use as well as from unauthorized disruption of college activities.²⁵

■■■■ *Observation:* A school loitering statute does not render inapplicable to schools a general trespass statute.²⁶

§ 195. Constitutionality; police power

Statutes and ordinances forbidding unauthorized persons to enter or remain upon school premises are within the police power of the state.²⁷ The right to exclude an unauthorized disruptive presence on state college campuses derives from the state's powers of property owner to limit the use of public property to that for which it has been dedicated and from the power to protect the peaceful conduct of those educational activities which have been authorized to take place there.²⁸ Thus, any order barring a person from a campus, as a basis for a criminal prosecution for trespass, must be shown to have had a legitimate purpose, rationally related to the power to maintain order on the campus, or that its enforcement violated no independent right of the defen-

23. *Braxton v Municipal Court for San Francisco Judicial Dist.*, 10 Cal 3d 138, 109 Cal Rptr 897, 514 P2d 697; *In re Jimi A.* (4th Dist) 209 Cal App 3d 482, 257 Cal Rptr 147, review den (Cal) 1989 Cal LEXIS 3853; *Re A.* (2nd Dist) 110 Cal App 3d 845, 168 Cal Rptr 338; *In Interest of T.T.* (Fla App D1) 506 So 2d 1156, 12 FLW 1214; *Brooks v State*, 170 Ga App 440, 317 SE2d 552; *People v Witzkowski*, 53 Ill 2d 216, 290 NE2d 236, app dismd 411 US 961, 36 L Ed 2d 682, 93 S Ct 2162 and app dismd 434 US 883, 54 L Ed 2d 169, 98 S Ct 253; *Re Appeal No. 631* (77) etc., 282 Md 223, 383 A2d 684; *State v Conk*, 180 NJ Super 140, 434 A2d 602; *State v Silva* (App) 86 NM 543, 525 P2d 903, cert den 86 NM 528, 525 P2d 888; *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831; *Re H.*, 103 Misc 2d 170, 425 NYS2d 514.

24. *In re Jimi A.* (4th Dist) 209 Cal App 3d 482, 257 Cal Rptr 147, review den (Cal) 1989 Cal LEXIS 3853.

25. *Brooks v State*, 170 Ga App 440, 317 SE2d 552.

26. *Re C.*, 66 Misc 2d 907, 323 NYS2d 267.

As to statutes prohibiting loitering on school property, generally, see 77 Am Jur 2d, Vagrancy § 13.

27. *State v Starr*, 57 Ariz 270, 113 P2d 356; *Phillips v Municipal Court of Los Angeles*, 24 Cal App 2d 453, 75 P2d 548; *People v Parker*, 208 Misc 978, 138 NYS2d 2.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 3.

28. *Brooks v State*, 170 Ga App 440, 317 SE2d 552.

Where the defendant cursed the principal, held her in a headlock, and acted in a belligerent fashion when asked to leave the campus and wait outside, the evidence before the court that the defendant's conduct interfered with the peaceful conduct of the activities of the school by sufficient affirmative acts of disturbance. *In re Jimi A.* (4th Dist) 209 Cal App 3d 482, 257 Cal Rptr 147, review den (Cal) 1989 Cal LEXIS 3853.

dant and the defendant's conviction for trespass should be vacated.²⁹ However, the fact that a university serves a quasi-public service and is a funded part of the state education system does not alter its character as a private educational institution, and persons not affiliated with the university have no right to enter and use its facilities, including a law library, unless the university grants that person a privilege or license to do so.³⁰

§ 196. —Equal protection

School trespass laws, which apply to whoever refuses or fails to leave after being requested to do so by an authorized employee, do not discriminate against a class of persons,³¹ as by unequal application or enforcement, in violation of the equal protection of the laws.³²

§ 197. —Due process; notice and hearing

School trespass laws do not deprive a person of due process of law by failing to provide for a hearing.³³

Although a defendant who leaves school premises when requested to do so is entitled to a hearing,³⁴ any right to a hearing is waived by a defendant who refuses to leave such premises when requested to do so.³⁵ Charging a person with willfully and unlawfully trespassing on school property in violation of a municipal ordinance, where numerous different and separate kinds of conduct are characterized as criminal trespass with respect to school property, in insufficient to adequately notify the defendant of the charges against him.³⁶

School trespass statutes also have survived constitutional attack based on allegations of vagueness³⁷ and overbreadth.³⁸ However, a state statute making

29. *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831 (the trial court could not properly rely on a presumption that the president of the public university acted lawfully since that would unconstitutionally shift the people's burden of proving that the particular order was lawful).

30. *Commonwealth v Downing*, 511 Pa 28, 511 A2d 792.

31. *Dean v State*, 13 Md App 654, 285 A2d 295.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 9.

32. *Anderson v Shaver* (DC NM) 290 F Supp 920.

Where in the absence of any evidence that the officials of a junior college had been selective in enforcing the right to have the campus free from any and all unauthorized use, defendants' motion for dismissal of a criminal trespass accusation on the ground of selective prosecution was correctly denied as there was no showing of purposeful discrimination. *Brooks v State*, 170 Ga App 440, 317 SE2d 552.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 10.

33. *Dunkel v Elkins* (DC Md) 325 F Supp 1235; *Braxton v Municipal Court for San Francisco Judicial Dist.*, 10 Cal 3d 138, 109 Cal Rptr 897, 514 P2d 697.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 8.

34. *Dunkel v Elkins* (DC Md) 325 F Supp 1235.

35. *Kirstel v State*, 13 Md App 482, 284 A2d 12, 50 ALR3d 328, app dismd 409 US 943, 34 L Ed 2d 214, 93 S Ct 287.

36. *Re A.* (2nd Dist) 110 Cal App 3d 845, 168 Cal Rptr 338.

37. *Dunkel v Elkins* (DC Md) 325 F Supp 1235; *Anderson v Shaver* (DC NM) 290 F Supp 920; *Mandel v Municipal Court for Oakland-Piedmont Judicial Dist. (1st Dist)* 276 Cal App 2d 649, 81 Cal Rptr 173; *State v Silva* (App) 86

it a misdemeanor for any person to refuse to leave the premises of any institution established for the purpose of the education of students enrolled therein when so requested, regardless of the reason, by the duly constituted officials of any such institution, is unconstitutionally overbroad.³⁹ A law is unconstitutionally overbroad which gives no guide as to what conduct is considered to be "disrupting" or as to what constitutes "reasonable justification or excuse" to disobey an order to leave the school premises upon request.⁴⁰

|||| Distinction: The distinction between the doctrines of vagueness and overbreadth is that the overbreadth doctrine is primarily applicable in the First Amendment area and may render void legislation which is lacking neither in clarity nor precision, whereas the vagueness doctrine rests on the due process clauses of the Fifth and Fourteenth Amendments and is applicable solely to legislation which is lacking in clarity and precision.⁴¹

§ 198. —First Amendment rights

School trespass statutes have withstood constitutional attack on First Amendment grounds,⁴² except where such laws in effect give school officials

NM 543, 525 P2d 903, cert den 86 NM 528, 525 P2d 888.

A criminal trespass statute is not unconstitutionally vague because it fails to specify a limitations period for the school official's order to a trespasser to leave the school campus and because it fails to define the meaning of "legitimate business on the campus," since a public school official is entitled to bar indefinitely nonauthorized persons from being on campus and the phrase legitimate business on campus is sufficiently definite for constitutional purposes to describe the type of activity that a person must lack in order to expose oneself to a possible criminal liability under the statute. *A.C. v State* (Fla App D3) 538 So 2d 136, 14 FLW 439.

A statute which prohibits trespass on school property by any person who "is not a student, officer, or employee of a public school" is not ambiguous or unconstitutionally vague in that it plainly prohibits any person not a student of a public school from remaining and use of the emphasized words throughout the statute "such school" clearly indicates that only a student of the school at which the trespass occurs falls outside the proscription of the statute and that a student of another public school system is not thereby exempt from the statute's class of prohibited persons. In *Interest of T.T.* (Fla App D1) 506 So 2d 1156, 12 FLW 1214.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 4[a].

38. *Braxton v Municipal Court for San Francisco Judicial Dist.*, 10 Cal 3d 138, 109 Cal Rptr 897, 514 P2d 697; *People v Witzkowski*, 53 Ill 2d 216, 290 NE2d 236, app dismd 411 US 961, 36 L Ed 2d 682, 93 S Ct 2162 and app dismd 434 US 883, 54 L Ed 2d 169, 98 S Ct 253; *Kirstel v State*, 13 Md App 482, 284 A2d 12, 50 ALR3d 328, app dismd 409 US 943, 34 L Ed 2d 214, 93 S Ct 287; *State v Sullivan*, 189 Neb 465, 203 NW2d 169; *Silva v State*, 86 NM 528, 525 P2d 888.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 5[a].

39. *Grody v State*, 257 Ind 651, 278 NE2d 280.

40. *Smith v Sheeter* (SD Ohio) 402 F Supp 624.

41. 16A Am Jur 2d, Constitutional Law § 460.

42. *People v Barnett* (1st Dist) 7 Ill App 3d 185, 287 NE2d 247; *Kirstel v State*, 13 Md App 482, 284 A2d 12, 50 ALR3d 328, app dismd 409 US 943, 34 L Ed 2d 214, 93 S Ct 287; *People v Sprowal*, 49 Misc 2d 806, 268 NYS2d 444, affd without op 17 NY2d 884, 271 NYS2d 310, 218 NE2d 343, remittitur amd 18 NY2d 683, 273 NYS2d 430, 219 NE2d 878 and app dismd 385 US 649, 17 L Ed 2d 670, 87 S Ct 768.

A school board did not violate the First Amendment rights of teacher's union representative when it refused to allow him to distribute union literature in the school parking lot, under a statute permitting the board to deny

unfettered discretion as to the reasons for which they could ask persons to leave the premises.⁴³

§ 199. Particular conduct

Conduct which constitutes trespass on school property includes—

- The selling or distribution of literature on⁴⁴ or near school property;⁴⁵
- An attempt to exhibit photographs at a college after the defendant's invitation to do so had been withdrawn;⁴⁶
- The forcible entry of an administration building of a university,⁴⁷ or the refusal to leave an administrative building when so ordered.⁴⁸

A criminal trespass has been held not established or supportable where the defendants escorted children to or from school.⁴⁹

VII. PRACTICE AND PROCEDURE [§§ 200–225]

A. IN GENERAL [§§ 200–204]

Research References

ALR Digest to 3d, 4th, and Federal: Limitations of Actions, §§ 67, 67.5, 201; Trespass

Index to Annotations: Limitation of Actions; Trespass

access to school grounds to anyone who did not have lawful business to pursue at the school, since the parking lot was not public forum, the representative was not conducting lawful business, and where the literature was not political in nature. *Grattan v Board of School Comrs.* (CA4 Md) 805 F2d 1160, 123 BNA LRRM 3199.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 7.

43. *Grody v State*, 257 Ind 651, 278 NE2d 280.

As to first amendment considerations in the enforcement criminal trespass statutes, generally, see §§ 170 et seq.

44. *State v Maloney*, 78 Wash 2d 922, 481 P2d 1.

45. *People v Sprowal*, 49 Misc 2d 806, 268 NYS2d 444, affd without op 17 NY2d 884, 271 NYS2d 310, 218 NE2d 343, remittitur amd 18 NY2d 683, 273 NYS2d 430, 219 NE2d 878 and app dismd 385 US 649, 17 L Ed 2d 670, 87 S Ct 768.

Where the defendant admitted, in a prosecution for criminal trespass, that he was distributing literature on a college campus without a permit, as required by a rule of the college, and that even after he was told this was not allowed he repeatedly refused to stop this activity, the defendant's conviction was not against the weight of the evidence. *Parma v*

Manning (Cuyahoga Co) 33 Ohio App 3d 67, 514 NE2d 749, motion overr.

For cases where distributing literature on or near school grounds did not establish or support criminal trespass, see *Mandel v Municipal Court for Oakland-Piedmont Judicial Dist.* (1st Dist) 276 Cal App 2d 649, 81 Cal Rptr 173; *People v Sprowal*, 49 Misc 2d 806, 268 NYS2d 444, affd without op 17 NY2d 884, 271 NYS2d 310, 218 NE2d 343, remittitur amd 18 NY2d 683, 273 NYS2d 430, 219 NE2d 878 and app dismd 385 US 649, 17 L Ed 2d 670, 87 S Ct 768.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 16.

46. *Kirstel v State*, 13 Md App 482, 284 A2d 12, 50 ALR3d 328, app dismd 409 US 943, 34 L Ed 2d 214, 93 S Ct 287.

47. *Dean v State*, 13 Md App 654, 285 A2d 295.

48. *State v Silva* (App) 86 NM 543, 525 P2d 903, cert den 86 NM 528, 525 P2d 888 (by implication).

49. *People v Bennett*, 66 Misc 2d 15, 319 NYS2d 622; *People ex rel. Bailey v Dennis* (City Ct) 208 NYS2d 522.

Annotations: Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340 § 15.

Restatement, Torts 2d § 160

Speiser, Krause, and Gans, The American Law of Torts, Chapter 23

1. LIMITATION OF ACTIONS [§§ 200-203]

§ 200. Generally

A statute which establishes a limitations period in an action for trespass to real property, commences running at the occurrence of the first actual damages.⁵⁰ The statute runs, in the case of a trespass or physical invasion of the surface of another's land, from the time of the unlawful entry.⁵¹ Where the original entry was privileged, an action for trespass does not accrue until the property owner has withdrawn or revoked his consent to a privileged use, and the statute of limitations does not run during the period of permitted use.⁵² Further, in the case of a use which was not authorized by the original license or privilege, the statute of limitations begins to run only at the time of the revocation of the license, and not from the commencement of the unauthorized use of the property.⁵³

■■■■ *Practice guide:* In some jurisdictions, in order to bring an action against a municipality, including one sounding in trespass, statutes provide that a notice of claim must be served upon the municipality within a limited number of days and failure to serve such notice may result in dismissal of the action; however, the failure to serve a notice of claim has been excused in cases in which the primary relief sought was equitable in nature and monetary damages were incidental.⁵⁴

§ 201. Continuing trespasses

Although a statute which establishes a limitations period in an action for trespass to real property commences running at the occurrence of the first actual damages,⁵⁵ where the trespass is a continuing one, the landowner may at any time recover for injury to his land which occurred within the statutory period,⁵⁶ after his discovery of the trespass.⁵⁷ A trespasser's continued occupa-

50. *Butler v Lindsey* (App) 293 SC 466, 361 SE2d 621.

For discussion of accrual of damages in trespass actions, see § 119.

51. *Smith v Sedalia*, 152 Mo 283, 53 SW 907; *Lee v Gram*, 105 Or 49, 196 P 373.

■■■■ *Observation:* The word "trespass" as used in a statute of limitations governing actions for trespass on real property refers only to the forcible or direct unlawful entry on land, and does not include a consequential or indirect injury thereto resulting from "trespass on the case" or negligence. *Lauck v General Tel. Co.* (Fla App D2) 300 So 2d 759 (decided under former statute).

As to the application of statutes of limitation' to trespass actions generally, see 51 Am Jur 2d, Limitation of Actions §§ 86, 87.

52. *Merrill Stevens Dry Dock Co. v G & J*

Invest. Corp. (Fla App D3) 506 So 2d 30, 12 FLW 1048, review den (Fla) 515 So 2d 229.

53. *Merrill Stevens Dry Dock Co. v G & J Invest. Corp.* (Fla App D3) 506 So 2d 30, 12 FLW 1048, review den (Fla) 515 So 2d 229.

■■■■ *Observation:* Since a trespass action is an action at law, laches is not a proper defense to trespass. See § 78.

54. *Clempner v Southold* (2d Dept) 154 App Div 2d 421, 546 NYS2d 101.

55. § 200.

56. *Butler v Lindsey* (App) 293 SC 466, 361 SE2d 621.

A plaintiff's action seeking a mandatory injunction and damages based on the alleged flooding of his property resulting from the construction of a dam by the defendant was not barred by the 3-year statute of limitations, since the injury caused by wrongfully ponding

tion of premises after his original entry, if not prolonged beyond the period of limitations, does not affect the right of the disseised owner to maintain the action.⁵⁸

A continuing trespass upon real property creates separate causes of action,⁵⁹ which are barred only by the running of the statute against the successive trespasses, and not by the running of the statute from the time of the original trespass.⁶⁰

An action predicated upon a continuous trespass is barred only by the expiration of such time that would create an easement by prescription or change title by operation of law.⁶¹

Practice guide: A continuing trespass is to be distinguished, not only from a single trespass resulting in continuing harm, but also from a series of separate trespasses on land, in that a continuing trespass is actionable by the possessor even if the intrusion or entry was originally made on the land pursuant to consent or privilege; the rule of continuing trespass is applicable after the transfer of ownership or possession, a matter of importance where a trespass action for the original entry is barred by the statute of limitations.⁶²

Distinction: If a trespass is followed by injury constituting a continuing nuisance, the damages for the original trespass must all be recovered in one action, but successive actions may be brought to recover damages for the continuation of the wrongful conditions, and in these the damages are estimated only to the date of the bringing of each suit, and the statute of limitations does not begin to run from the date of the original trespass.⁶³

§ 202. —Effect of permanency of offending structures

Offending structures causing continuing trespasses and recurring damages

or diverting water on the land of another is regarded as a renewing trespass, and a portion of plaintiff's property was alleged to have remained submerged even at the commencement of this action. *Whitfield v Winslow*, 48 NC App 206, 268 SE2d 245, petition den 301 NC 405, 273 SE2d 451.

57. *Carr v Fleming* (4th Dept) 122 App Div 2d 540, 504 NYS2d 904 (holding that plaintiff's complaint alleging a continuous trespass, commenced within 3 years of discovery that the town had installed a sewer system on his property 10 years prior to its discovery, was not time barred).

58. *Woll v Voigt*, 105 Minn 371, 117 NW 608.

59. § 114.

60. *Harbach v Des Moines & K.C.R. Co.*, 80 Iowa 593, 44 NW 348; *Galway v Metropolitan E.R. Co.*, 128 NY 132, 28 NE 479.

Where the jury was instructed that if it found the part of plaintiffs' claim—against the county for trespass by digging a ditch which drained an accumulation of water on the individual defendants' lands, increasing their value while diverting the water over the plaintiffs' lands—

to be barred by the statute of limitations, it was still to determine whether, by diverting water over plaintiffs' land, defendants had continued to trespass and thus have caused damage to the plaintiffs within the statutory period, since by its general verdict, the jury of necessity found that there was no continuing trespass; further, since the county and the defendants were being sued for the same act, the jury could not have concluded that the claim against the individuals was barred without also finding the statute of limitations to bar the claim against the county. *Arguelles-Vasquez v Immigration & Naturalization Service* (CA9) 800 F2d 223, later proceeding (CA9) 820 F2d 1112, later proceeding (CA9) 828 F2d 5.

As to continuing trespasses, see §§ 2, 26.

61. *Carr v Fleming* (4th Dept) 122 App Div 2d 540, 504 NYS2d 904.

62. Restatement, Torts 2d § 160, Comments f, h.

63. *Smith v Sedalia*, 152 Mo 283, 53 SW 907; *Doran v Seattle*, 24 Wash 182, 64 P 230.

As to trespass and nuisance distinguished, see § 6.

are not susceptible to a simplistic application of a statute of limitations.⁶⁴ For instance, where actions for damages to real property must be brought within 5 years of construction of the complained-of structure on the property, such a statutory limitation does not apply to a continuing trespass on the plaintiff's property, such as a storm sewer underground, but pertains to permanent structures built on neighboring land.⁶⁵ If the offending structure is permanent and negligently or unlawfully built or maintained, recurring recoveries for trespass may be had as the injuries occur.⁶⁶

§ 203. —Applications of particular statutory time periods

In the case of a statutory limitation period of 5 years, where a continuing trespass began more than 5 years prior to the filing an action, the statute of limitations does not bar the action entirely, but limits recovery to a period of 5 years immediately prior to suit.⁶⁷

Where a statute provides a 15-year limitation period, the fact that a plaintiff waits 14 years to assert his rights against another's continuous trespass by encroachment on the land does not, by laches, bar an action for recovery of possession brought within the 15-year limitation period.⁶⁸

2. JURISDICTION AND VENUE [§ 204]

§ 204. Generally

Actions to recover damages for trespasses to the person or to personal property are transitory in character and may be brought against the offender wherever he may be found.⁶⁹ However, actions to recover damages for injuries to real property are local, and not transitory, and therefore they must be brought in the forum where the land is situated.⁷⁰ Although criticized,⁷¹ expressly repudiated,⁷² and qualified by some courts,⁷³ this doctrine has been

64. *Wimmer v Ft. Thomas* (Ky App) 733 SW2d 759.

Where an apartment building encroached approximately 1 foot onto the plaintiff's land, the encroachment was permanent in nature, and since the structure was permanent, the physical trespass was continuous; and, since the building was built more than 3 years before the institution of the action, an action for continuing trespass was for damages incident to the original wrong, that is, the construction of the building itself, and no recovery could be had where statute declared that where the trespass is a continuing one such action must be commenced within 3 years from the original trespass, and not thereafter. *Williams v South & South Rentals, Inc.*, 82 NC App 378, 346 SE2d 665.

65. *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176.

66. *Wimmer v Ft. Thomas* (Ky App) 733 SW2d 759.

67. *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176.

68. *Difronzo v Port Sanilac*, 166 Mich App 148, 419 NW2d 756, app den 431 Mich 852 (stating that the question whether plaintiff could be precluded from all or part of the relief sought as a result of laches was not before the appellate court).

Annotations: Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 ALR3d 760.

69. *McKenna v Fisk*, 42 US 241, 11 L Ed 117.

70. 20 Am Jur 2d, Courts § 124; 77 Am Jur 2d, Venue § 17.

71. *Brisbane v Pennsylvania R. Co.*, 205 NY 431, 98 NE 752.

72. *French v Clinchfield Coal Co.* (DC Del) 407 F Supp 13; *Widmer v Wood*, 243 Ark 457, 420 SW2d 828; *Little v Chicago, S.P., M. & O.R. Co.*, 65 Minn 48, 67 NW 846; *Broadus v Vanadium Corp. of America* (1st Dept) 19 App Div 2d 886, 244 NYS2d 336.

Annotations: Jurisdiction of action at law for damages for tort concerning real property in another state or country, 30 ALR2d 1219 § 6.

considered to embrace actions of trespass to real property so as to forbid the courts of one state from entertaining an action for trespass to land situated either in another state.⁷⁴

■■■■ Observation: The question whether actions to recover pecuniary damages for trespass to real estate are purely local depends upon whether such actions are viewed as relating to the real estate or only as affording a personal remedy.⁷⁵

B. PLEADINGS [§§ 205–213]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass

Index to Annotations: Answer or Plea; Pleading; Trespass

23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 1-6, 21-30

3 Am Jur Trials 681, 766, Tactics and Strategy of Pleading § 71

Speiser, Krause, and Gans, The American Law of Torts, Chapter 23

1. DECLARATION, PETITION, OR COMPLAINT [§§ 205–210]

§ 205. Generally

In pleading a case of trespass, as in all other cases,⁷⁶ the material and essential facts constituting the cause of action should be succinctly stated.⁷⁷ The allegations should state facts, not conclusions of law.⁷⁸ Although the petition should allege all of the ultimate facts constituting the cause of action, the probative facts necessary to prove them should not be alleged.⁷⁹ For instance, where the action is brought for the loss of or injury to personal property, the thing taken or injured must be described with reasonable

73. *Ingram v Great Lakes Pipe Line Co.* (Mo App) 153 SW2d 547 (actions affecting real estate are not local unless they directly affect the title).

74. *Ellenwood v Marietta Chair Co.*, 158 US 105, 39 L Ed 913, 15 S Ct 771; *Taylor v Sommers Bros. Match Co.*, 35 Idaho 30, 204 P 472, 42 ALR 189; *Holderman v Pond*, 45 Kan 410, 25 P 872.

As to jurisdiction of action for injury to crop, see 21 Am Jur 2d, Crops § 70.

Annotation: Jurisdiction of action at law for damages for tort concerning real property in another state or country, 30 ALR2d 1219 § 3.

75. *Huntington v Attrill*, 146 US 657, 36 L Ed 1123, 13 S Ct 224.

76. 61A Am Jur 2d, Pleading § 71.

77. *Bingham v National Bank of Montana*, 105 Mont 159, 72 P2d 90, 113 ALR 315; *Stonegap Colliery Co. v Hamilton*, 119 Va 271, 89 SE 305.

Forms: Complaint, petition, or declaration—Trespass to real property. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 1-6.

78. *Buck v Colbath*, 7 Minn 310, affd 70 US 334, 18 L Ed 257.

Where the conclusions of the petitioners' complaint contain no factual allegations which, if proved, would establish that the defendant telephone company intended or knew with a high degree of certainty that by granting licenses to cable television companies such companies would fail to seek permission before entering the plaintiffs' lands, as they were required to do under the terms of the license agreements, and that they would therefore trespass upon the plaintiffs' lands, the plaintiff failed to support its allegation that the defendant knew that its licensees would trespass and, thus, such conclusions could not be considered by the court in examining the legal sufficiency of the complaint. *Dietz v Illinois Bell Tel. Co.* (1st Dist) 154 Ill App 3d 554, 107 Ill Dec 360, 507 NE2d 24, app den (Ill) 113 Ill Dec 296, 515 NE2d 105.

79. *Ploof v Putnam*, 81 Vt 471, 71 A 188.

certainty,⁸⁰ but an averment of its value is not material.⁸¹ However, if the plaintiff desires to establish the fact that the defendant acted maliciously, he must allege malice in his petition, as charges of recklessness, carelessness, negligence, or violence are not equivalent to an allegation of malice.⁸²

Since in order to maintain trespass to real property, the plaintiff must be in either actual or constructive possession thereof,⁸³ his declaration must allege title,⁸⁴ or possession,⁸⁵ and that the defendant committed acts of trespass on certain lands of the plaintiff.⁸⁶ The premises, however, need not be described by metes and bounds, or by government survey, although the description must be sufficiently certain so as not to mislead the defendant, and so as to put him on notice of the locus in quo.⁸⁷

§ 206. Supplemental and amended pleadings

While a supplemental pleading cannot introduce a new cause of action,⁸⁸ a supplemental complaint presenting merely a continuation of the same trespasses does not introduce a new subject matter of litigation.⁸⁹ Similarly, an amended pleading may not introduce a wholly different cause of action, particularly after limitations have run.⁹⁰ A complaint may properly be amended so as to substitute the correct date for the occurrence of the trespass complained of, even though the statute of limitations has run.⁹¹ The amendment of a complaint for injury to real property so as to charge the occurrence of the trespass alleged for only a part of the time set forth in the original complaint does not set up a new cause of action.⁹²

§ 207. Pleading statutory and punitive damages

Counsel are cautioned that multiple damages or penalties generally cannot be recovered in the absence of statutory authority and, therefore, they must be distinctly claimed in the complaint; it is insufficient merely to set forth facts on which a liability therefor might arise.⁹³

If the facts alleged by the plaintiff in an a trespass action seeking damages

80. *Randlette v Judkins*, 77 Me 114.

81. *Baker v Baker*, 54 Mass 125.

82. *Re Grout*, 88 Vt 318, 92 A 646.

A trespass claim in the complaint, alleging that defendants knowingly, wrongfully, and maliciously deposited hazardous waste on the plaintiffs' land, were sufficient allegations to put the defendants on notice of the alleged conduct. *Regan v Cherry Corp.* (DC RI) 706 F Supp 145.

As to liability for trespass involving reckless or negligent acts, see § 12.

For discussion of malicious acts of trespass, warranting punitive damages, see § 150.

Forms: Complaint, petition, or declaration—Allegations. 23 Am Jur Pl & Pr Forms (Rev), Trespass, Forms 21-30.

83. § 36.

84. *Steltz v Morgan*, 16 Idaho 368, 101 P 1057; *Denham v Cuddeback*, 210 Or 485, 311 P2d 1014.

85. *Stannard v Shell Eastern Petroleum Products*, 117 NJL 163, 187 A 191; *Denham v Cuddeback*, 210 Or 485, 311 P2d 1014; *Clay v St. Albans*, 43 W Va 539, 27 SE 368.

86. *Herschbach v Cohen*, 207 Ill 517, 69 NE 932.

87. *Elmore v Fields*, 153 Ala 345, 45 So 66; *Bessemer Land & Improv. Co. v Jenkins*, 111 Ala 135, 18 So 565; *Lapp v Stanton*, 116 Md 197, 81 A 675.

88. 61A Am Jur 2d, Pleading § 292.

89. *State v Black River Phosphate Co.*, 32 Fla 82, 13 So 640.

90. 61A Am Jur 2d, Pleading § 322.

91. *Andrews v Marsden*, 278 Pa 56, 122 A 171, 29 ALR 636.

92. *Hess v Vinton Colliery Co.*, 255 Pa 78, 99 A 218, 14 ALR 1.

93. 22 Am Jur 2d, Damages §§ 813-816.

show that the trespass was inflicted with malice, oppression, or other like circumstances of aggravation,⁹⁴ then punitive or exemplary damages may be recovered without being specially pleaded.⁹⁵ Assuming that the other necessary elements for an award of punitive damages are pleaded and proved, a plaintiff is entitled to have his case submitted to the jury for an award of punitive damages.⁹⁶ However, to be entitled to punitive damages, the plaintiff must distinctly set up in his complaint the elements that make up the basis of his claim for such damages and must make such averments as will advise the defendant that he will have to meet a demand of that kind at trial.⁹⁷

Statutory damages and punitive damages arising out of the same cause of action for trespass are not mutually exclusive.⁹⁸ Thus, where the plaintiff pleads entitlement to punitive damages in an action for trespass, a defendant who consents to the trial of the plaintiff's cause as pleaded may not subsequently on appeal contend that the plaintiff was limited to the recovery of treble damages pursuant to statute.⁹⁹

■■■■ **Caution:** Ordinarily, an election of remedies should be made before the case is submitted to the trier of fact; defense counsel are cautioned that where the propriety of a jury award of statutory treble damages is first raised in a defense motion for a new trial, the plaintiffs may gain the advantage of hindsight and elect to recover the higher of the two awards.¹

§ 208. Criminal complaint; indictment or information

The constitutional right of an accused to be informed of the nature and cause of the accusation against him requires that every material fact and essential element of the offense be charged with precision and certainty in the indictment or information.² An information that omits an essential element of the crime charged is defective and cannot serve as the basis of a conviction.³ Thus, where a complaint underlying a criminal information sets out that "on the twenty seventh day of September, before making and filing of this complaint, the defendant unlawfully and willfully committed criminal trespass against the peace and dignity of the state," motions to quash were properly granted on the grounds of vagueness, indefiniteness, and uncertainty, where the criminal trespass statute provides several ways the offense may be committed, where the constituent elements of the offense must appear in both the complaint and the information, and where the statute requires the designation

94. § 150.

95. *Rhodes v Harwood*, 273 Or 903, 544 P2d 147, later app 280 Or 399, 571 P2d 492.

96. *Rhodes v Harwood*, 273 Or 903, 544 P2d 147, later app 280 Or 399, 571 P2d 492.

97. 22 Am Jur 2d, Damages §§ 731 et seq.

98. *Baker v Ramirez* (5th Dist) 190 Cal App 3d 1123, 235 Cal Rptr 857.

Forms: Complaint, petition, or declaration—Allegation of demand for both compensatory and punitive damages. 8 Am Jur Pl & Pr (Rev), Damages, Form 111.

—Allegation of demand for exemplary or punitive damages. 8 Am Jur Pl & Pr (Rev), Damages, Forms 112-114.

—Allegation of demand for multiple damages. 8 Am Jur Pl & Pr (Rev), Damages, Form 115.

99. *Johnson v Jensen* (Minn) 446 NW2d 664.

1. *Johnson v Jensen* (Minn) 446 NW2d 664.

2. 41 Am Jur 2d, Indictments and Informations § 78.

3. *State v Kreth*, 150 Vt 406, 553 A2d 554 (where a statute provides that a person is guilty of criminal trespass who enters a dwelling house, knowing he is not licensed or privileged to do so, where the information failed to charge, as required by the statute, that the defendant knew he was not licensed to enter, the conviction based on the information must fail).

of the place of the offense.⁴ However, whether the initial entry is lawful is irrelevant to a trespass based upon a statute prohibiting the remaining upon the land after notice is given to depart, without regard to the lawfulness of the initial entry, and, thus, it was not necessary for the state to allege in the complaint that the defendant was wrongfully on the land.⁵

§ 209. Checklist for trespass to real property

To state a cause of action for trespass to real property, a complaint, petition, or declaration should allege:

- Jurisdictional facts, if required.
- Facts fixing venue, when required, especially the county in which the property is located.
- Facts concerning diversity of citizenship and the amount in controversy, if the complaint is to be filed in federal court as a diversity action.
- A description of the property sufficient to identify and locate it.⁶
- Plaintiff's actual or constructive possession (the right to immediate possession) of the property.
- Facts showing that a trespass was committed.⁷
- Injury to the property, if any, resulting from the trespass.⁸
- Facts showing the case to be a proper one for exemplary or multiple damages if such damages are justified on the grounds of malice, fraud, willfulness, or wantonness and, if applicable, the statutory authority for such an award.⁹
- Damages:
 - General;
 - Special;
 - Exemplary.

§ 210. Checklist for trespass to chattel

To state a cause of action for a trespass to chattel, a complaint, petition, or declaration should allege:

- Facts showing jurisdiction and venue according to local statutes, rules, and practice.
- Facts concerning diversity of citizenship and amount in controversy, if complaint is to be filed in federal court as a diversity action.
- Plaintiff's ownership of the chattel.¹⁰
- Plaintiff's actual or constructive possession (the right to immediate possession) of the chattel.
- Act or acts of the defendant constituting the trespass:

4. Villarreal v State (Tex App El Paso) 729 SW2d 348.

5. People v Mortenson (2d Dist) 178 Ill App 3d 871, 128 Ill Dec 46, 533 NE2d 1134.

6. ■■■■ *Observation:* A legal description is not necessary.

7. ■■■■ *Observation:* Great leeway is permitted respecting this allegation.

8. ■■■■ *Practice guide:* An allegation of injury

is not an essential allegation, since trespass is an intentional tort and the law imports damage; however, the allegation is necessary if substantial damages are to be recovered. § 117.

9. § 150.

10. ■■■■ *Recommendation:* Although an allegation of title generally is not required in this action, it is required in some jurisdictions, even though plaintiff is not required to prove his title.

- Wrongful taking;
- Injury;
- Interference with possession.
- If applicable, facts and circumstances making the defendant responsible for the acts of another, an animal, or an inanimate agency.
- Damages:
 - Value of property at the time of the trespass;
 - Actual loss sustained or cost or repairs and replacement;
 - Incidental damages proximately caused by the trespass, such as, loss of profits, expenses incurred in regaining possession, and rental value;
 - Exemplary damages;¹¹
 - Interest, where allowed by local statutes and practice.
- Prayer for relief.

2. PLEA OR ANSWER [§§ 211–213]

§ 211. Generally

As a general rule, a plea of the general issue raises an issue as to the merits of the cause of action declared upon¹² and, in an action for trespass, requires the plaintiff to prove the material allegations in his declaration.¹³

Under the plea of the general issue, every circumstance directly connected with the act complained of may be proved to show that the defendant did not commit the trespass at all,¹⁴ to mitigate the damages,¹⁵ or to prove or rebut malice.¹⁶ Likewise, both the fact of the trespass and the title of the plaintiff are put in issue, and any title in the defendant, whether freehold or possessory, is admissible in evidence.¹⁷

§ 212. Pleading affirmative defenses

In an action of trespass, no affirmative defense is available to the defendant under a general denial.¹⁸ Under some statutes, affirmative defenses must either be specially pleaded or notice of them must be given under the general issue.¹⁹

11. ■■■■ Practice guide: Such damages must be supported by facts showing malice, fraud, oppression, or other aggravating circumstances.

12. 61A Am Jur 2d, Pleading § 363.

13. McKenna v Fisk, 42 US 241, 11 L Ed 117.

14. Floyd v Ricks, 14 Ark 286.

15. Barret v Mobile, 129 Ala 179, 30 So 36; Sutherland v Ingalls, 63 Mich 620, 30 NW 342.

16. Ottawa Gas Light & Coke Co. v Graham, 28 Ill 73; Meagher v Driscoll, 99 Mass 281.

17. Lacey v Morris, 215 Ala 302, 110 So 379; Denham v Cuddeback, 210 Or 485, 311 P2d 1014; Heyward v Farmers' Min. Co., 42 SC 138, 19 SE 963, reh dismd 42 SC 158, 20 SE 64.

Whether the plaintiff alleges title or not, the defendant in his answer may set up either title in himself or license from the true owner

which, if established, will amount to an adjudication that he and not the plaintiff is entitled to possession, thus defeating the plaintiff's case. Upon this issue the defendant assumes the burden of proof. Lane v Mims, 221 SC 236, 70 SE2d 244.

18. Stone Resources, Inc. v Barnett (Tex App Houston (1st Dist)) 661 SW2d 148 (where a lessee filed only a general denial in the suit to recover damages as a result of the alleged trespass and failed to appear at trial, the lessee waived any affirmative defense and could not then complain of insufficient evidence to prove lack of consent); Shell Petroleum Corp. v Liberty Gravel & Sand Co. (Tex Civ App) 128 SW2d 471.

As to discussion of particular defenses to trespass, and a general discussion of statutory affirmative defenses, see §§ 74 et seq.

19. 61A Am Jur 2d, Pleading § 152.

For instance, a defense of justification or excuse,²⁰ license or authority,²¹ or title in a third person, and the defendant's connection with it, must be specially pleaded in order that evidence thereof may be admitted.²²

The statute of limitations defense is an affirmative defense to trespass.²³ that must be raised in the trial court by pleading or by motion before it will be considered on appeal; thus, where the defendant fails to allege anywhere in its answer to the plaintiff's action for trespass that it was barred by the statute of limitations, the defense may not subsequently be raised on appeal.²⁴

■■■■ *Observation:* Unless from the face of the complaint the cause of action appears barred or unless the facts raising the bar of the statute are admitted, the statute must be pleaded specially.²⁵

Unless the plaintiff has anticipated in his complaint a plea of limitations, it is usually necessary to oppose or avoid it by way of a reply.²⁶ However, where the reply does not state facts sufficient to avoid the defendant's plea that the trespass sued on is barred by limitations, the court may reject it.²⁷

§ 213. Pleading counterclaims; setoff

In jurisdictions requiring that a counterclaim arise out of the same transaction or circumstances as the plaintiff's claim,²⁸ one independent trespass cannot be used as a setoff against another trespass arising from the same circumstance.²⁹ However, in an action for trespass to real property, the subject of the action is the property trespassed on,³⁰ and a counterclaim to recover the property is connected with the subject of the action.³¹ Likewise, where the defendant in such an action asserts title to the realty alleged to have been trespassed on, a counterclaim for damage done to the freehold by the plaintiff may be set up as connected with the subject of the action, namely, the land.³²

C. EVIDENCE [§§ 214-225]

Research References

ALR Digest to 3d, 4th, and Federal: Trespass
Index to Annotations: Evidence; Trespass

20. *Louisville & N.R. Co. v Bartee*, 204 Ala 539, 86 So 394, 12 ALR 251; *Stone Resources, Inc. v Barnett* (Tex App Houston (1st Dist)) 661 SW2d 148; *Southern Pine Lumber Co. v Smith* (Tex Civ App) 183 SW2d 471, writ ref w o m; *Shell Petroleum Corp. v Liberty Gravel & Sand Co.* (Tex Civ App) 128 SW2d 471.

For a discussion of pleading justification or excuse, generally, see 61A Am Jur 2d, Pleading § 157.

21. *Hamilton v Windolf*, 36 Md 301.

22. *Omaha & Grant Smelting & Refining Co. v Tabor*, 13 Colo 41, 21 P 925.

As to common law defenses to trespass, generally, and as to statutory affirmative defenses to criminal trespass, see §§ 74 et seq.

23. § 78.

24. *MacWillie v Southeast Alabama Gas Dist.* (Ala) 539 So 2d 245.

25. 51 Am Jur 2d, Limitation of Actions § 453.

26. 51 Am Jur 2d, Limitation of Actions § 479.

27. *Elk Garden Big Vein Coal Mining Co. v Gerstell*, 95 W Va 471, 121 SE 569, 33 ALR 298.

28. 20 Am Jur 2d, Counterclaim, Recoupment, and Setoff § 66.

29. *Miser v O'Shea*, 37 Or 231, 62 P 491; *Baitary v Ilderton*, 214 SC 357, 52 SE2d 417, 10 ALR2d 1163.

Annotations: Cause of action in tort as counterclaim in tort action, 10 ALR2d 1167 § 18.

30. *Miser v O'Shea*, 37 Or 231, 62 P 491.

31. *Whitlock v Ledford*, 82 Ky 390.

32. *Stillwell v Duncan*, 103 Ky 59, 44 SW 357.

Speiser, Krause, and Gans, *The American Law of Torts*, Chapter 23

1. IN GENERAL [§§ 214, 215]

§ 214. Generally; presumptions

In a trespass action, the general rules of evidence apply.³³

Although actual possession of real property, even though without title, is a sufficient basis for recovery as against a mere trespasser,³⁴ recovery is not allowed upon the prior possession per se; rather, the presumption of title in the plaintiff is such that, as against a bare trespasser, possession is sufficient proof of title.³⁵ Further, where title is shown to have existed at one time, whether by the probative force of occupancy or otherwise, it is presumed to continue.³⁶

Where several persons are engaged together in a common purpose and a trespass is committed by one or more of them, assent thereto by the others is presumed only if the common design is unlawful; where the object to be accomplished is a lawful one, assent is a matter of fact to be proved.³⁷

When property is open to the public at the time of an alleged criminal trespass, the accused is presumed to have a license and privilege to be present.³⁸

|||| Caution: A “mandatory” or “conclusive” presumption, which operates to require the finder of fact to hold against the defendant in the absence of some showing by the defendant to the contrary, may never be applied in a criminal case with respect to one of the elements of the crime being prosecuted.³⁹

§ 215. Sufficiency; circumstantial evidence

Proof that a person was present at the commission of a trespass, without either disapproving or opposing it, is evidence from which it is competent for a jury to infer that he assented thereto and aided and abetted the same.

Evidence that a person was present at the commission of a trespass without either disapproving or opposing it is sufficient for a jury to infer that such person assented to, and aided and abetted such trespass.⁴⁰

The proven facts must be inconsistent with innocence in order to uphold a

33. *Batchelder v Kelly*, 10 NH 436.

As to the rules of evidence, generally, see 29, 30 Am Jur 2d, Evidence.

34. § 38.

35. *Northern P.R. Co. v Lewis*, 162 US 366, 40 L Ed 1002, 16 S Ct 831; *Campbell v Rankin*, 99 US 261, 25 L Ed 435; *Burt v Panjaud*, 99 US 180, 25 L Ed 451.

As to the significance of title with respect to actual possession as an element in an action for trespass, see §§ 39 et seq.

36. *Northern P.R. Co. v Lewis*, 162 US 366, 40 L Ed 1002, 16 S Ct 831; *Campbell v Rankin*, 99 US 261, 25 L Ed 435; *Burt v Panjaud*, 99 US 180, 25 L Ed 451.

As to presumptions relating to possession and ownership of real property, generally, see 29 Am Jur 2d, Evidence § 234.

37. *Richardson v Emerson*, 3 Wis 319.

As to the liability of cotrespassers, see §§ 66 et seq.

38. *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831.

As to aspects of trespass on public premises, see §§ 48, 172.

39. § 172.

40. *McMannus v Lee*, 43 Mo 206.

As to liability of cotrespassers, generally, see §§ 66 et seq.

conviction for criminal trespass on circumstantial evidence.⁴¹ For instance, where only circumstantial evidence pointed to the defendant as a perpetrator of the crime of criminal trespass in slashing a person's tires, notwithstanding that the circumstances raised a strong suspicion, where such circumstances failed to exclude a reasonable hypothesis consistent with innocence, conviction for criminal trespass must be reversed.⁴²

2. BURDEN OF PROOF [§§ 216-220]

§ 216. Generally

Generally speaking, in actions of trespass, as in all other actions, the burden of proof rests upon the party who initiates the action.⁴³ Thus, the plaintiff or petitioner has the burden of proving that he was rightfully in possession at the time of the trespass⁴⁴ and that the defendant made an unauthorized entry onto the plaintiff's land.⁴⁵ Where the plaintiff introduces evidence showing actual possession of the premises trespassed upon, the burden of proving title superior to that of the plaintiff rests upon the defendant.⁴⁶ However, where a subsequent property owner brings an action for a continuing trespass, as for a storm sewer placed on the property allegedly without consent, the plaintiff does not have the burden of proving that the initial entry was unlawful where the defendant raised the issue of consent as an affirmative defense and, thus, has the burden of proof on the issue.⁴⁷

Once a plaintiff has proven ownership of the property or a lawful right of possession, and an entry by the defendant, the burden of proof falls upon the defendant to plead and prove consent or license as a justification for the entry.⁴⁸

The defendant has the burden of proof on the affirmative defenses of casual trespass or probable cause.⁴⁹ Thus, once the plaintiff has proven trespass and

41. *McGinnis v State*, 183 Ga App 17, 358 SE2d 269.

42. *McGinnis v State*, 183 Ga App 17, 358 SE2d 269.

43. *Little Pittsburg Con. Min. Co. v Little Chief Con. Min. Co.*, 11 Colo 223, 17 P 760; *Rollins v Blackden*, 112 Me 459, 92 A 521; *Zagaroli v Pollock*, 94 NC App 46, 379 SE2d 653, review den 325 NC 437, 384 SE2d 548 (by implication); *Johns v Shaler*, 240 Pa Super 129, 368 A2d 339.

As to the general rule that the burden of proof in any cause rests upon the party who asserts the affirmative of an issue, see 29 Am Jur 2d, Evidence § 127.

44. *Jaycox v E.M. Harris Bldg. Co.* (Mo App) 754 SW2d 931; *Zagaroli v Pollock*, 94 NC App 46, 379 SE2d 653, review den 325 NC 437, 384 SE2d 548 (by implication); *Stone Resources, Inc. v Barnett* (Tex App Houston (1st Dist)) 661 SW2d 148.

45. *Sentry Enterprises, Inc. v Canal Wood Corp.*, 94 NC App 293, 380 SE2d 152; *Zagaroli*

v Pollock, 94 NC App 46, 379 SE2d 653, review den 325 NC 437, 384 SE2d 548 (by implication); *Stone Resources, Inc. v Barnett* (Tex App Houston (1st Dist)) 661 SW2d 148.

46. *Southern R. Co. v Sanford*, 262 Ala 5, 76 So 2d 164; *Heath v Williams*, 25 Me 209; *Cathcart v Matthews*, 91 SC 464, 74 SE 985.

47. *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176.

As to pleading affirmative defenses, generally, see § 212.

48. *Little Pittsburg Con. Min. Co. v Little Chief Con. Min. Co.*, 11 Colo 223, 17 P 760; *Rosenthal v Crystal Lake* (2d Dist) 171 Ill App 3d 428, 121 Ill Dec 869, 525 NE2d 1176; *Milton v Puffer*, 207 Mass 416, 93 NE 634; *Witheral v Muskegon Booming Co.*, 68 Mich 48, 35 NW 758; *Stone Resources, Inc. v Barnett* (Tex App Houston (1st Dist)) 661 SW2d 148.

49. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600.

the damages, the burden shifts to the defendant to show that the trespass was casual or involuntary.⁵⁰

Practice guide: Inasmuch as the party moving for summary judgment has the burden of proof on the motion, to obtain summary judgment in an action for trespass, the plaintiff must establish that the defendant trespassed on the land and that there is no genuine issue of material fact with respect to one or more of the essential elements of the defense.⁵¹

The degree of proof required to discharge the burden upon a party to an action of trespass having the affirmative of an issue, and the weight and sufficiency of the evidence offered in support of such issue or in rebuttal thereof, are governed by the rules applicable to other civil actions.⁵²

§ 217. Damages

A party who sues for damages for a trespass has the burden of showing the amount of the loss in the manner in which the jury or the trial judge in a nonjury case can calculate the amount of the loss with a reasonable degree of certainty.⁵³

Where statutory multiple damages are claimed, the burden of proving that the trespass was committed with the intent required by the statute, or without the consent of the owner, is upon the plaintiff.⁵⁴ The burden of showing an intent or purpose within the purview of the exculpatory provisions is upon the defendant where a multiple damage statute by its terms limits or restricts liability.⁵⁵

Where a plaintiff claims damages for permanent injury to the real property as a result of the defendant's alleged trespass, the burden is on the defendant to prove that a lesser amount than that claimed by the plaintiff will sufficiently compensate for the loss.⁵⁶

Observation: When a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that cost of restoration would be less.⁵⁷

§ 218. Statutory elements of criminal trespass

In general, under a criminal trespass statute, in order to convict the

50. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600; *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 252.

As to casual or unintended trespasses, generally, see § 30.

51. *Steel Creek Development Corp. v Smith*, 300 NC 631, 268 SE2d 205, later app 58 NC App 506, 294 SE2d 23, petition den 306 NC 740, 295 SE2d 763.

52. 29 Am Jur 2d, Evidence §§ 1080 et seq.

53. *Ingram v Summerlin*, 179 Ga App 832, 348 SE2d 68.

As to assessment of damages for trespass, see §§ 120, 121.

54. *Matanuska Electric Asso. v Weissler* (Alaska) 723 P2d 600; *Padman v Rhodes*, 126 Mich 434, 85 NW 1130; *McHargue v Calchina*, 78 Or 326, 153 P 99.

As to statutory damages for trespass, generally, see § 153.

55. *Michigan Land & Iron Co. v Deer Lake Co.*, 60 Mich 143, 27 NW 10.

56. *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 252.

57. *Armitage v Decker* (1st Dist) 218 Cal App 3d 887, 267 Cal Rptr 399, review den (Cal) 1990 Cal LEXIS 2505.

As to sufficiency of proof of damages in trespass actions, generally, see §§ 157 et seq.

defendant for the offense, the state is obligated to prove beyond a reasonable doubt the statutory elements of the offense.⁵⁸

■■■■ Observation: In a criminal prosecution for trespassing, where a statute requires that the state disprove beyond a reasonable doubt any affirmative defense raised at trial, notwithstanding the stipulation of the parties that the state did not have to put on a prima facie case and that the defense would put on evidence regarding the issue of whether the order to leave the subject property was lawful, the language of the stipulation would not be construed as to give it the effect of a waiver of a right not plainly intended to be relinquished. Furthermore, even assuming that the defendants could relinquish their statutory right to have the state prove that the order to leave the property was lawful, such stipulation did not express a clear intention by the defendants to do so.⁵⁹

§ 219. —Showing of trespass on public property

When property is open to the public at the time of an alleged criminal trespass, the accused is presumed to have a license and privilege to be present,⁶⁰ and the state has the burden of proving that a lawful order excluding the defendant from the premises issued, that the order was communicated to the defendant by a person with authority to make the order, and that the defendant defied the order.⁶¹ The state may not satisfy its burden of proof on the issue by relying on a presumption that the public official authorized to maintain order on the premises discharged his or her responsibility, in the particular instance, in a lawful manner.⁶² However, the state is not required to prove that the defendant defied an order to leave communicated by the owner or authorized person in order to establish a violation of a criminal trespass statute requiring only that notice not to enter be given by actual communication to the defendant.⁶³

■■■■ Practice guide: A “mandatory” or “conclusive” presumption, which operates to require the finder of fact to hold against the defendant in the

58. *Johnson v State* (Alaska App) 739 P2d 781; *State v Delgado*, 19 Conn App 245, 562 A2d 539; *R.C.W. v State* (Fla App D1) 507 So 2d 700, 12 FLW 1242; *People v Schmid* (3d Dept) 124 App Div 2d 896, 508 NYS2d 314; *Beachwood v Cohen* (Cuyahoga Co) 29 Ohio App 3d 226, 29 Ohio BR 272, 504 NE2d 1186.

The defendant, an Environmental Protection Agency inspector who conducted a warrantless search of a commercial pesticide business pursuant to federal law, was not guilty of criminal trespass in so doing, where the state failed to prove that the defendant committed the alleged offense knowing she was not licensed or privileged to do so since, in view of the defendant's reliance upon the privilege she perceived was given to her under statute, there existed reasonable doubt that the defendant had knowledge she was not privileged to enter and examine records. *State v Santiago*, 218 NJ Super 427, 527 A2d 963.

59. *State v Cargill*, 100 Or App 336, 786 P2d 208, review gr 310 Or 133, 794 P2d 794.

60. § 214.

61. *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831.

Where there was no evidence of any boisterous conduct, injury, threats, blocking of entrances, other persons arrested or conduct that the defendants exceeded the restricted or limited conditions of implied consent to be on public premises, and where the alleged trespass took place in the parking lot or in a building open to the public, and in a common area not inside any of the particular businesses or an abortion clinic, the evidence was insufficient to show a trespass. *St. Louis County v Stone* (Mo App) 776 SW2d 885.

As to aspects of trespass on public premises, see §§ 48, 172.

62. *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831.

63. *R.C.W. v State* (Fla App D1) 507 So 2d 700, 12 FLW 1242.

absence of some showing by the defendant to the contrary, may never be applied in a prosecution for criminal trespass with respect to one of the elements of the crime being prosecuted since, shifting the burden of production or persuasion to the defendant under such circumstances, would impermissibly relieve the state of its burden of proving every element of the crime beyond a reasonable doubt.⁶⁴

Where public property is involved, before a person may be convicted of unlawful entry, the prosecution also is required to prove an additional specific factor establishing the defendant's lack of a legal right to remain.⁶⁵ The purpose of this requirement is to protect all citizens against capricious and arbitrary enforcement of the unlawful entry statutes by public officials, so that an individual's otherwise lawful presence on public property is not conditioned upon the mere whim of a public official.⁶⁶ The additional specific factors which must be established by the state in prosecuting a person from lawful entry on public property may consist of posted regulations, signs, or fences and barricades regulating the public's use of government property.⁶⁷

§ 220. —Particular other showings required by statute

Various criminal trespass statutes require the prosecution to prove that—

- The defendant knowingly remained on the premises, after personally being ordered to leave, and recklessly disregarded a lawful order that he not remain.⁶⁸
- The defendant, knowing that he was not privileged or licensed to do so, entered or remained in a building after an order to leave or not to enter had been communicated to him.⁶⁹
- The defendant entered as a knowing trespasser, with at least indirect evidence of a requisite element.⁷⁰

64. *People v Leonard*, 62 NY2d 404, 477 NYS2d 111, 465 NE2d 831.

Although evidence was presented, in a prosecution for criminal trespass, to show that a defendant may have unlawfully been on the premises of a nursing home previously, such evidence could not be used to imply guilt as to a subsequent incidence, where defendant's presence at that time was as consistent with innocence as with guilt, and where the prosecution introduced no evidence to show that the defendant was without privilege to be on the property in question. *Beachwood v Cohen* (Cuyahoga Co) 29 Ohio App 3d 226, 29 Ohio BR 272, 504 NE2d 1186.

As to presumptions relating to possession and ownership of real property, generally, see 29 Am Jur 2d, Evidence § 234.

65. *Hemmati v United States* (Dist Col App) 564 A2d 739; *United States v Powell* (Dist Col App) 563 A2d 1086.

66. *Hemmati v United States* (Dist Col App) 564 A2d 739.

67. *United States v Powell* (Dist Col App) 563 A2d 1086.

68. *Johnson v State* (Alaska App) 739 P2d 781.

69. *State v Delgado*, 19 Conn App 245, 562 A2d 539; *State v Lo Sacco*, 12 Conn App 172, 529 A2d 1348; *State v O'Brien* (Mo App) 784 SW2d 187; *State in Interest of L.E.W.*, 239 NJ Super 65, 570 A2d 1019, certif den 122 NJ 144, 584 A2d 216.

70. *State v Mention*, 12 Conn App 258, 530 A2d 645, certif den 205 Conn 809, 532 A2d 78.

A defendant, who had been hired to shovel snow off walkways, one of which led up to a garage door, and who indicated a belief that it was necessary in the performance of his duties that he open the garage door and enter it to get at the snow, was not a trespasser, where it was not unreasonable for him to believe that to do the job effectively he had to be inside the garage or else damage the garage door and that the property owner would have empowered him to enter the garage to accomplish what she had employed him to do, since the statute requires that the actor be aware of the fact that he is making an unwarranted intrusion. *Warfield v State*, 315 Md 474, 554 A2d 1238.

—The defendant willfully entered the property alleged, that the property was owned by or lawfully in possession of the person alleged, notice not to enter had been given by actual communication to the defendant, and that defendant's entering the property was without permission.⁷¹

To establish the offense of home invasion, the state must prove that a defendant entered the dwelling of another person without authority, that he was not a peace officer acting in the line of duty, that he entered knowing one or more persons were present in the dwelling, used force or threatened the imminent use of force on the persons within the dwelling, and he was armed with a dangerous weapon.⁷²

The burden rests upon the state of proving the absence of good faith on the part of one accused of trespass, because the act must generally be shown to be willfully done.⁷³

■■■■ *Practice guide:* Inasmuch as the trial judge must charge the jury on each crime specified in an indictment or accusation, unless the evidence does not warrant a conviction of such crime, or unless the state has affirmatively withdrawn a crime or stricken it from the indictment or accusation, where the record reveals no charge on the elements of criminal trespass, the defendant's conviction of that offense must be reversed.⁷⁴

3. ADMISSIBILITY [§§ 221–225]

§ 221. Generally; parol evidence

In general, in order to be admissible, matters offered in evidence must be relevant to the issues and tend to establish or disprove them.⁷⁵ Evidence without bearing on the issues or the measure or amount of damages is therefore inadmissible.⁷⁶ For instance, in determining the value of the plaintiff's property, where the defendant's expert did not consider the most important factor, the removal of trees, any testimony he gave would have been

The state proved the defendant's guilt beyond a reasonable doubt with respect to the charge of criminal trespass in the third degree, where testimony established that the defendant was actually seen exiting the neighbor's garage. *People v Schmid* (3d Dept) 124 App Div 2d 896, 508 NYS2d 314.

71. *R.C.W. v State* (Fla App D1) 507 So 2d 700, 12 FLW 1242.

72. *People v Fountain* (1st Dist) 179 Ill App 3d 986, 128 Ill Dec 698, 534 NE2d 1303, app den 126 Ill 2d 563, 133 Ill Dec 672, 541 NE2d 1110; *People v Ader* (2d Dist) 176 Ill App 3d 613, 126 Ill Dec 112, 531 NE2d 407.

As to criminal trespass to a dwelling, see § 188.

73. *Bowman v State*, 258 Ga 829, 376 SE2d 187, on remand 191 Ga App 207, 382 SE2d 434.

The evidence was sufficient to sustain a conviction of criminal trespass against the defendant for harvesting crops on property, which he had previously owned, notwithstanding the

defendant's contention that he could not be liable in criminal trespass because he believed in good faith that he could re-enter the property, where the evidence was that the defendant planted crops on the land in question after the confirmation of the sheriff's sale, that he had attended the sale and had received notice of its confirmation, and where the record clearly indicated that the sheriff had advised the defendant that he was trespassing and was not to be on the property and had also received such notice in court proceedings, negating good faith. *State v Meints*, 225 Neb 335, 405 NW2d 15.

74. *Gardner v State*, 185 Ga App 184, 363 SE2d 843.

75. 29 Am Jur 2d, Evidence § 251.

76. *Louisville & N.R. Co. v Barte*, 204 Ala 539, 86 So 394, 12 ALR 251; *Schwartz v McQuaid*, 214 Ill 357, 73 NE 582; *Longfellow v Quimby*, 29 Me 196; *Perkins v Towle*, 43 NH 220.

irrelevant in deciding how the removal of trees had affected the value of the property.⁷⁷

Where the defendant relies upon the doctrine of *res judicata* as a defense,⁷⁸ parol testimony may be admitted under certain circumstances to show what issues were involved and settled in the prior action.⁷⁹ Parol evidence is admissible to show that the same acts of alleged trespass had been directly put in issue in a prior action between the plaintiff and the defendant's principal and that a decision on them had been rendered after a trial on the merits.⁸⁰ But, where the plaintiff relies upon title, and not possession, to sustain an action for trespass to real property, a parol admission by the defendant as to the plaintiff's title, without more, is not admissible in evidence.⁸¹

The trial court properly may exclude from the jury's consideration, in a criminal trespass case, evidence offered by the defendants concerning the defense, where the evidence is insufficient as a matter of law to establish the particular defense raised.⁸²

§ 222. Character of parties

In trespass actions, evidence as to the character of the parties is, as a rule incompetent,⁸³ even though the defendant's conduct is alleged to have been accompanied with malice on his part.⁸⁴

§ 223. Attendant circumstances

Any circumstances surrounding a trespass and forming part of the *res gestae* are admissible in evidence.⁸⁵ Matters attending the commission of a trespass not constituting an independent cause of action in themselves, as, for example, the manner in which the act constituting the trespass was performed, may be proved for the purpose of affecting the allowance of damages.⁸⁶ Thus, when the plaintiff claims exemplary damages, any facts tending to show the motives and intent of the defendants in entering upon the plaintiff's premises are admissible in evidence.⁸⁷ On the other hand, it is competent to show the good

77. *Property Owners Asso. v Ying* (2d Dept) 137 App Div 2d 509, 524 NYS2d 252.

78. § 79.

79. 46 Am Jur 2d, Judgments § 609.

80. *Emery v Fowler*, 39 Me 326.

81. *Bivins v McElroy*, 11 Ark 23.

As to declarations and admissions of a party, generally, see § 225.

82. *State v Drummy*, 18 Conn App 303, 557 A2d 574.

83. *Fahey v Crotty*, 63 Mich 383, 29 NW 876; *Smithwick v Ward*, 52 NC 64.

As to the rule that the character of a party to a civil action is generally regarded as irrelevant, see 29 Am Jur 2d, Evidence § 336.

84. *Gebhart v Burkett*, 57 Ind 378; *Barton v Thompson*, 56 Iowa 571, 9 NW 899.

85. *Louisville & N.R. Co. v Ballard*, 85 Ky 307, 3 SW 530.

86. *Raisler v Springer*, 38 Ala 703; *Louisville & N. R. Co. v Ballard*, 85 Ky 307, 3 SW 530; *Fowler v Owen*, 68 NH 270, 39 A 329.

Where, in order to convict a defendant of criminal trespass, it must be proven that he was aware of his conduct and aware of the attendant circumstances, the defendants were entitled to offer testimony that they in good faith believed they were on public property, with respect to the issue whether they knowingly remained on private property and intended to violate the law. *Bowman v State*, 258 Ga 829, 376 SE2d 187, on remand 191 Ga App 207, 382 SE2d 434.

87. *Ansay v Boecking—Berry Equipment Co.* (CA10 Okla) 450 F2d 433.

In a prosecution for destruction of property and criminal trespass, alleging that the defendant had purposely damaged property belonging to a restaurant and trespassed upon its premises, notwithstanding the trespass charge was dismissed on appeal, testimony concerning the defendant's prior acts which tended to

faith of the defendant when the presence of a bad motive will tend to increase the damages.⁸⁸

Where punitive damages are at issue, evidence of the defendant's net worth is admissible.⁸⁹

§ 224. Testimony of party

A property owner is competent to testify as to the market value of his property.⁹⁰

The jury could properly base an award of damages, in an action for trespass, upon the opinion testimony of the plaintiff regarding the fair rental value of the property which the defendant trespassed upon, where the plaintiff demonstrated sufficient personal knowledge to testify regarding his opinion under the rule requiring that opinion testimony from a lay witness is admissible only when rationally based on the perception of the witness.⁹¹

§ 225. —Declarations and admissions

In trespass actions, evidence of declarations of the defendant is admissible when the animus with which the defendant acted is involved.⁹² For instance, acts and declarations by one in possession of land as owner, respecting the dividing line between his property and that of an adjoining proprietor, and adverse to his interest, are admissible in evidence in an action of trespass against parties entering under and identified in interest with him.⁹³ However, in actions of trespass, as in other actions, self-serving declarations are not admissible in evidence as proof of the facts asserted,⁹⁴ as, for example, proof of title in the plaintiff.⁹⁵

show he had notice that he was not welcome to return to the restaurant in question, was relevant to the charge of trespassing and the trial court did not err in admitting it. *State v Babajamia*, 223 Neb 804, 394 NW2d 289.

88. *Ansay v Boecking—Berry Equipment Co.* (CA10 Okla) 450 F2d 433; *Haley v Taylor*, 77 Miss 867, 28 So 752.

89. *Rodrian v Seiber* (5th Dist) 194 Ill App 3d 504, 141 Ill Dec 585, 551 NE2d 772.

As to punitive damages for trespass, generally, see §§ 148 et seq.

90. *Williams v Allied Automotive, Autolite Div.* (ND Ohio) 704 F Supp 782, 19 ELR 20689.

91. *Zagaroli v Pollock*, 94 NC App 46, 379 SE2d 653, review den 325 NC 437, 384 SE2d 548.

In an action for trespass, where plaintiff testified that 11 trees were cut and removed from his property improperly by trespass, that he had bought and sold property in the county,

was familiar with property values, and stated his opinion as to the value of the property prior to the cutting and as to the amount of diminution in value resulting from the cutting, such evidence was sufficient to present an issue of damages to the jury. *Ingram v Summerlin*, 179 Ga App 832, 348 SE2d 68.

92. *Breitenbach v Trowbridge*, 64 Mich 393, 31 NW 402; *Winter v Peterson*, 24 NJL 524; *International & G. N. R. Co. v Telephone & Tel. Co.*, 69 Tex 277, 5 SW 517.

As to the rule that a party's declarations are regarded as acts from which his state of mind may be inferred, see 29 Am Jur 2d, Evidence § 650.

93. *Deming v Carrington*, 12 Conn 1; *Pike v Hayes*, 14 NH 19; *Beaufort Land & Invest. Co. v New River Lumber Co.*, 86 SC 358, 68 SE 637.

94. 29 Am Jur 2d, Evidence § 621.

95. *Munsey v Hanly*, 102 Me 423, 67 A 217.

TRESPASSERS

See PREMISES LIABILITY

TRESPASS ON THE CASE

See ACTIONS

TRESPASS TO TRY TITLE

See EJECTMENT

TRIAL

by

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Scope of topic: This article discusses activities, matters, and proceedings at, incident, preparatory, or preliminary to trials of both civil and criminal actions in courts of general jurisdiction. It covers initial case investigation and preparation, including client interviews, trial briefs, and trial simulations; preliminary proceedings, including severance and separate trial, and calendars and dockets; conduct of the trial, including persons present, right to open and close, jury view, and the conduct of the judge; presentation of evidence, including the order of proof, objections, exceptions, and motions to strike evidence; argument and conduct of counsel, including the opening statement and closing argument; the province of the court and jury, including submission of the case or a specific issue to the jury and particular questions of law and fact; taking the case from the jury, including nonsuit and direction of the verdict; instructions to the jury; custody, conduct, and deliberations of the jury; discharge of the jury, declaration of a mistrial, and withdrawal or substitution of jurors; the verdict, including form and sufficiency, and special verdicts and findings; and trial by the court without a jury, including findings of fact and conclusions of law.

Treated elsewhere:

Joinder, splitting or consolidating causes of action, see 1 Am Jur 2d, Actions §§ 100 et seq. (joinder), 127 et seq. (splitting), 156 et seq. (consolidation)

Continuance or postponement of trials, see 17 Am Jur 2d, Continuance

Criminal law and procedure generally, see 21 and 21A Am Jur 2d, Criminal Law

Suits in equity, see 27 Am Jur 2d, Equity

Evidence generally, see 29 and 30 Am Jur 2d, Evidence

Judgments, see 46 and 47 Am Jur 2d, Judgments

Right to a jury trial, selection and impanelment of juries, voire dire examination, and challenging of jurors, see 47 Am Jur 2d, Jury

Motions and orders generally, see 56 Am Jur 2d, Motions, Rules, and Orders

New trial, see 58 Am Jur 2d, New Trial

Pleading, see 61A Am Jur 2d, Pleading

Pretrial conferences, see Pretrial Conference and Procedure

Stipulations as to evidence or other matters pertaining to a trial, see 73 Am Jur 2d, Stipulations

Calling and examination of witnesses, see 81 Am Jur 2d, Witnesses

Federal aspects: This article discusses the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure with respect to trial matters. General discussion of the Federal Rules will be found in 21 and 21A Am Jur 2d, Criminal Law and in 32-32A-32B Am Jur 2d, Federal Practice and Procedure.

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Annotation References:

ALR Digest to 3d, 4th, and Federal: Criminal Law §§ 101 et seq.; Trial

Index to Annotations: Attorney or Assistance of Attorney; Arguments of Counsel; Bias or Prejudice; Character and Reputation; Credibility of Witnesses; Discrimination; Discretion of Court; Docket and Calendar of Court; Evidence; Exclusion or Suppression of Evidence; Expert and Opinion Evidence; Failure to Testify; Family, Relatives, and Household; Golden Rule Argument; *Griffin v California*; Instructions to Jury; Joint and Separate Trial; Jury and Jury Trial; Motions and Orders; Preliminary or Pretrial Matters; Preparation; Prosecuting Attorneys; Questions of Law and Fact; Severance of Action; Special Verdict; Trial; Trial by Court; Verdict; Witnesses

Practice References:

33 Federal Procedure, L Ed Ch 77

1 Am Jur Pl & Pr Forms (Rev), Actions; 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure; 8A Am Jur Pl & Pr Forms (Rev), Dismissal, Discontinuance, and Nonsuit; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure; 23 Am Jur Pl & Pr Forms (Rev), Trial

1 Federal Procedural Forms, L Ed, Actions in District Court; 7 Federal Procedural Forms, L Ed, Criminal Procedure

1 Am Jur Trials 1, Interviewing the Client; 2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses; 2 Am Jur Trials 669, Preparing and Using Maps; 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases; 3 Am Jur Trials 335, Preparing and Using Photographs in Criminal Cases; 3 Am Jur Trials 427, Preparing and Using Experimental Evidence; 3 Am Jur Trials 507, Preparing and Using Diagrams; 3 Am Jur Trials 681, Tactics and Strategy of Pleading; 5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases; 5 Am Jur Trials 285, Opening Statements—Plaintiff's View; 5 Am Jur Trials 305, Opening Statements—Defense View; 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence; 5 Am Jur Trials 611, Presenting Plaintiff's Case 5 Am Jur Trials 695, Courtroom Semantics; 6 Am Jur Trials 641, Summations For the Plaintiff; 6 Am Jur Trials 731, Summations For the Defense; 6 Am Jur Trials 771, Nonjury Summations; 6 Am Jur Trials 807, Sample Summations in Personal Injury and Death Cases; 6 Am Jur Trials 873, Prosecution Summations; 6 Am Jur Trials 1043, Special Verdicts; 20 Am Jur Trials 441, Motion in Limine Practice; 23 Am Jur Trials 95, The Use of Videotape in Civil Trial Preparation and Discovery; 28 Am Jur Trials 599, Principles of summation; 40 Am Jur Trials 249, Using or challenging a "day-in-the-life" documentary in a personal injury lawsuit

24 Am Jur POF2d 633, Jury Misconduct Warranting New Trial; 42 Am Jur POF2d 617, Invalidity of suspect's waiver of Miranda rights

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I. IN GENERAL [§§ 1-5]

Research References

ALR Digest to 3d, 4th, and Federal, Criminal Law §§ 101 et seq.; Trial §§ 1 et seq.
Index to Annotations, Trial

§ 1. Definitions

A "trial" has been defined as the judicial investigation and determination of the issues between the parties to an action,¹ before a court that has jurisdiction.² While the word often signifies an examination of matters of law as well,³ it is commonly used to designate that step in an action by which issues or

1. Warn v Brooks-Scanlon, Inc. (DC Or) 256 F Supp 690, affd (CA9 Or) 374 F2d 893, cert den 388 US 909, 18 L Ed 2d 1348, 87 S Ct 2113; Hamblin v Superior Court of Los Angeles County, 195 Cal 364, 233 P 337, 43 ALR 1509; Campbell v Hulett (Ky) 243 SW2d 608; Tittsworth v Chaffin (Mo App) 741 SW2d 314; Columbus Packing Co. v State, 106 Ohio St 469, 1 Ohio L Abs 100, 140 NE 376, 37 ALR

1525; Gulf, C. & S.F.R. Co. v Muse, 109 Tex 352, 207 SW 897, 4 ALR 613.

2. Tittsworth v Chaffin (Mo App) 741 SW2d 314.

3. Carpenter v Winn, 221 US 533, 55 L Ed 842, 31 S Ct 683; Tittsworth v Chaffin (Mo App) 741 SW2d 314; Brenan v Lamotte (Tex Civ App San Antonio) 441 SW2d 626.

questions of fact are decided.⁴ Thus, it is said that a trial is an examination, before a competent tribunal, according to the laws of the land, of the facts put in issue by the pleadings, for the purpose of determining such issues.⁵ The term has been defined by statute as meaning a judicial examination of the issues,⁶ and by a civil procedure rule as a hearing on the merits of a controversy after the opportunity for preliminary proceedings has passed.⁷

■■■■ Observation: A trial is not a contest between lawyers but a presentation of facts to which the law may be applied to resolve the issues between the parties and to determine their rights.⁸ Nor is it a sport; it is an inquiry into the truth in which the general public has an interest.⁹ The real objective of a trial is to secure a fair and impartial administration of justice between the parties to the litigation,¹⁰ and not the achievement of a hearing wholly free from errors.¹¹

§ 2. Distinctions

The term "trial" is to be distinguished from the term "hearing" as applied to equity and certain other cases.¹² Moreover, the hearing of evidence after default in a divorce proceeding is not a "trial" as that term is used in statutory provisions for new trial.¹³ And the taking of testimony before a master pursuant to a stipulation to send the case to him "to take testimony and report the same" is not part of the trial, where the master's duty is merely to take and write out the testimony to be reported to the court for use on the trial when it should be begun.¹⁴

§ 3. Necessity

Once a civil action has been instituted and issue is joined upon the pleadings, there must be a trial on the issue joined before a judgment can be rendered.¹⁵ Even where an agreed case is submitted without an action, the

4. *Black v Jones*, 208 Ark 1011, 188 SW2d 626; *Joseph v State*, 236 Ind 529, 141 NE2d 109, 69 ALR2d 824, cert dismd 359 US 117, 3 L Ed 2d 673, 79 S Ct 720.

5. *Re Zuckerman's Estate*, 13 Misc 2d 93, 168 NYS2d 83.

The purpose of a trial is to determine the validity of the allegations. *State ex rel. Larson v District Court of Eighth Judicial Dist.*, 149 Mont 131, 423 P2d 598.

Practice References: Since the pleadings formulate the issues which will be determined at trial, a careful analysis of the law and facts should precede their preparation. Generally as to the object of pleadings, see 61A Am Jur 2d, Pleading § 3.

6. *Columbus Packing Co. v State*, 106 Ohio St 469, 1 Ohio L Abs 100, 140 NE 376, 37 ALR 1525; *Pfleeger v Swanson*, 229 Or 254, 367 P2d 406, 1 ALR3d 707.

7. *Orr v Iowa Public Service Co.* (Iowa) 277 NW2d 899.

8. *Nationwide Mut. Ins. Co. v Riggle*, 173

Ohio St 288, 19 Ohio Ops 2d 157, 181 NE2d 696.

9. *Klein v Bendix-Westinghouse Automotive Air Brake Co.* (Lorain Co) 8 Ohio App 2d 271, 37 Ohio Ops 2d 271, 221 NE2d 722, revd on other grounds 13 Ohio St 2d 85, 42 Ohio Ops 2d 283, 234 NE2d 587.

A trial is a search for truth. *Ward v Shipp* (ND) 340 NW2d 14.

10. *Gutsch v Hyatt Legal Services* (Minn App) 403 NW2d 314.

11. *Morgan v Cole* (Hamilton Co) 22 Ohio App 2d 164, 51 Ohio Ops 2d 312, 259 NE2d 514.

12. See 27 Am Jur 2d, Equity § 235.

13. *Hamblin v Superior Court of Los Angeles County*, 195 Cal 364, 233 P 337, 43 ALR 1509.

14. *Carson v Hyatt*, 118 US 279, 30 L Ed 167, 6 S Ct 1050.

15. *Re Lambert*, 134 Cal 626, 66 P 851.

Generally as to joinder and note of issue, see §§ 61 et seq.

parties ordinarily are entitled to a trial or hearing thereon as in the case of an action, and the issues of law raised thereby will be considered by the court as though raised in an appropriate form of action brought on proper pleadings.¹⁶

Although a clerk may enter a default judgment for the payment of a fixed, definite, or ascertainable amount of money or damages, judicial action is generally required where the damages recoverable are unliquidated, indefinite, and uncertain.¹⁷

§ 4. Commencement

The time as of which a trial is regarded as having commenced varies according to the construction and application of the statute in question.¹⁸ Generally speaking the trial begins when the selection of a jury to try the case commences,¹⁹ but, even where the voir dire examination is considered part of the "trial," it is not a part of a "trial of the facts."²⁰ The calling of the jury is a part of the trial.²¹ On the other hand, the examination of veniremen and the impaneling of the jury have been held mere preparations for trial, and under a statute requiring a motion to be made before trial, an application made immediately after the swearing of the jury is in time.²² Thus, some criminal cases have declared that the trial begins after the jury is impaneled,²³ or with the swearing of the jury,²⁴ or the finishing of the pleadings.

§ 5. Termination

A jury trial is not complete until all issues of law and fact have been

16. 3 Am Jur 2d, Agreed Case § 32.

17. 47 Am Jur 2d, Judgments § 1157.

18. As to commencement of trial for the purpose of severance of actions or issues for trial, see § 177.

As to when an action is "brought" or commenced within the federal statute as to removal of causes, see 32B Am Jur 2d, Federal Practice and Procedure § 2415.

As to the beginning of trial within a statute as to change of venue, see 77 Am Jur 2d, Venue § 73.

As to when accused is put on trial within the rule as to former jeopardy, see 21 Am Jur 2d, Criminal Law §§ 258 et seq.

19. *Hopt v Utah* (1884) 110 US 574, 28 L Ed 262, 4 S Ct 202 (overruled, disagreed with, and diverged from on other grounds by multiple cases); *Coachella Valley County Water Dist. v Dreyfuss* (4th Dist) 91 Cal App 3d 949, 154 Cal Rptr 467; *State v Melendez* (Fla) 244 So 2d 137, conformed to (Fla App D3) 247 So 2d 449; *Pratt v Bishop*, 257 NC 486, 126 SE2d 597; *Pfleeger v Swanson*, 229 Or 254, 367 P2d 406, 1 ALR3d 707.

Generally as to commencement and termination of action, see 1 Am Jur 2d, Actions §§ 86 et seq.

20. *Pfleeger v Swanson*, 229 Or 254, 367 P2d 406, 1 ALR3d 707.

Generally, as to voir dire examination, see 47 Am Jur 2d, Jury §§ 195 et seq.

As to voluntary nonsuit or dismissal as of right at any time "before trial," see 24 Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 23.

21. *Pratt v Bishop*, 257 NC 486, 126 SE2d 597; *Re McIntyre's Estate*, 78 ND 10, 47 NW2d 527; *Vroman v Kempke*, 34 Wis 2d 680, 150 NW2d 423.

As to impanelment of the jury, generally, see 47 Am Jur 2d, Jury §§ 189 et seq.

As to the necessity of accused's presence during the impaneling or selection of the jury, see 21A Am Jur 2d, Criminal Law §§ 695, 895, 906, 909, 913.

22. *Yulee v Vose*, 99 US 539, 25 L Ed 355.

23. *State v Pancoast*, 5 ND 516, 67 NW 1052; *State v Robinson*, 78 Wash 2d 479, 475 P2d 560.

24. *Thomas v Mills*, 117 Ohio St 114, 5 Ohio L Abs 401, 157 NE 488, 54 ALR 1220; *State v Robinson*, 78 Wash 2d 479, 475 P2d 560.

As to the attachment of jeopardy after the jury has been sworn, see 21 Am Jur 2d, Criminal Law § 260.

determined and the final judgment entered.²⁵ A trial to a court has been held not complete until the decision has been entered in the minutes, or reduced to writing by the judge and signed by him and filed with the clerk.²⁶

With respect to criminal trials, it has been held that the trial ends when the jury has returned its verdict.²⁷

II. CASE DEVELOPMENT AND PREPARATION FOR TRIAL [§§ 6-59]

A. CLIENT INTERVIEW [§§ 6-17]

Research References

Index to Annotations, Interviews; Investigations and Interrogations; Preparation; Trial

9A Am Jur 2d Legal Forms 2d, Hospitals and Asylums §§ 136:113, 136:114; 15 Am Jur Legal Forms 2d, Physicians and Surgeons § 202:177

1 Am Jur Trials 1, Interviewing the Client

Bailey and Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985) §§ 2:1 et seq.

Charfoos and Christensen, Personal Injury Practice: Technique and Technology (1986) §§ 7:1 et seq.

Danner and Toothman, Trial Practice Checklists (1989), § 1:10

Purver, Young, Davis, and Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) Ch 1

Schweitzer, Cyclopedia of Trial Practice 2d ed, Vol 1 (1970) §§ 1-3

Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) §§ 1:1 et seq.

§ 6. Purpose or function of interview

The most important and obvious function of the initial interview with a client is to obtain information that will allow the attorney to determine whether there is a case at all and to start the investigation rolling. Once it is determined that the client does have a case, the information gathered during the client interviews is used as a basis for almost every phase of trial practice, from the preparation of the retainer to the recovery of judgment. It is used in settlement negotiations as well as in taking depositions and in other discovery proceedings. It is used in drafting pleadings, in making a trial brief, in selecting the jury, and in the examination of the client at trial. It is used again in the questioning of witnesses and in the cross-examination of the adverse party. For these reasons the interviews with the client should be both accurate and exhaustive. Complete preparedness can be gained only from a penetrating and objective examination of the client during the interview process.²⁸

²⁵ State v Koch, 33 Mont 490, 85 P 272; Gulf, C. & S.F.R. Co. v Muse, 109 Tex 352, 207 SW 897, 4 ALR 613.

The trial of a cause is not concluded until motions for judgment and for new trial are disposed of. Nevitt v Wilson, 116 Tex 29, 285 SW 1079, 48 ALR 355.

²⁶ Gulf, C. & S.F.R. Co. v Muse, 109 Tex 352, 207 SW 897, 4 ALR 613.

Generally as to trial by the court, see §§ 1956 et seq.

²⁷ Puckett v Commonwealth, 200 Ky 509, 255 SW 125, 34 ALR 96; Henry v State, 10 Okla Crim 369, 136 P 982.

²⁸ **Practice References:** 1 Am Jur Trials 1, Interviewing the Client § 1; Schweitzer, Cyclopedia of Trial Practice 2d ed Vol 1 (1970) § 1.

■■■■ Reminder: The objective of the interview should be to obtain all the facts, whether favorable or unfavorable. This may prevent the unexpected disclosure at the adversary's discovery proceeding, or at the trial, of some negative and damaging fact for which the attorney has not been prepared.²⁹

§ 7. —Defense interview

Where the client is the defendant, the attorney must not confine the interview to obtaining defensive information. The objective of the interview should be to obtain all the facts, whether favorable or unfavorable from the defense standpoint. Furthermore, counsel should evaluate the settlement possibilities of the case as well as its successful defense.

■■■■ Reminder: Since a considerable amount of time may pass after the matter has been placed in the hands of the attorney for the plaintiff and the latter has completed his preliminary interviews and investigation, the defendant is likely to be hazy as to details, and information obtained from him during the interview must ordinarily be verified by, and supplemented with, data from various sources.³⁰

§ 8. Initial interview

The client interview often proceeds in two phases: an initial informal interview and a second,³¹ more intensive, fact-gathering session. These two interviews may be conducted at different times or back to back so that they might be perceived as a continuum by the client. However they are scheduled, they serve distinct functions and should pursue distinct goals.³²

The goals of the initial phase are to establish rapport with the client and to screen out cases that are undesirable because of some readily apparent legal, factual, or logistical flaw.

■■■■ Caution: Failure to elicit an accurate account of the facts from the client could waste much time pursuing a dead-end aspect of the case or investigating the case from a wrong angle.³³

After establishing rapport, the attorney should address the preliminary screening function of the initial phase of the client interview by encouraging the client to relate the problem in his or her own words.

29. Practice References: Schweitzer, *Cyclopedia of Trial Practice* 2d ed Vol 1 (1970) § 1 (supp).

30. Practice References: 1 Am Jur Trials 1, Interviewing the Client § 2.

31. ■■■■ Observation: Actually, the number of interviews that will be needed to handle a case for a given client will depend largely on the nature and complexity of the litigation. The case may be so involved that interviews with the client are almost continuous. But counsel should avoid having to recontact the client for information neglected during the first interview. 1 Am Jur Trials 1, Interviewing the Client § 4.

32. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7.2; Purver, Young,

Davis, and Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) Ch 1.

As to the second interview, see § 9.

Law Reviews: Sherry, *Client Interviewing for Lawyers*. 14 *Legal Economics* (April 1988); Lazin, *Can We Talk? The First Interview With Potential Clients Can Make or Break Your Practice*. 7 *California Lawyer* (August 1987); Clay and Rairdon, *How to Conduct a Meeting with a Prospective Client*. 65 *Mich BJ* (June 1986); *How to Interview the Client*. 9 *Litigation* 25 (Summer 1983).

33. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7.2.

Law Reviews: Reuben, *Getting the Truth From the Client*. 14 *Litigation*, Fall 1987.

■■■■ *Recommendation:* Open-ended questions are preferable to questions requiring a yes or no answer because they elicit more information. The attorney should let the client talk as much as possible. The attorney should not take notes at this stage of the interview; although occasionally a key word may be written down to serve as a mnemonic device for the attorney, extensive note-taking distracts the potential client and prevents the attorney from giving undivided attention to the client and the problem presented.³⁴

■■■■ *Caution:* At the first interview with a new client, the client should be asked whether or not another attorney was consulted by the client before this interview. An affirmative answer may reveal that another attorney's rights must be disposed of before proceeding with the interview and the case. Moreover, such answer may indicate that the client is shopping around,³⁵ and that in fact the client/consumer may be interviewing the attorney.³⁶

■■■■ *Practice guide:* Use of a flowchart of the client interview process may be helpful.³⁷

§ 9. Second interview

Once the attorney has decided on the basis of the initial consultation that the claim appears to merit further work-up, the second phase of the interview should be carried out. The purpose of this phase is to gather additional information to evaluate the claim further. This more formal phase of the interview may be conducted on the same day as the first, or it may be scheduled for another day to provide supplemental information or to better understand the case in the light of additionally acquired data. The major difference between the two phases is the in-depth nature of the second phase.³⁸ This phase commonly involves the use of various types of interview forms or checklists³⁹ designed to elicit general information regarding the background of the client⁴⁰ as well as facts relating to the specific matter at hand, such as medical malpractice,⁴¹ workers' compensation,⁴² other types of

34. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7.2.

35. Practice References: Schweitzer, *Cyclopedia of Trial Practice* 2d ed Vol 1 (1970) § 1 (supp).

36. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7:1.

37. See Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7.2.

38. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7.3.

39. ■■■■ Caution: Counsel should bear in mind that checklists tend to be self-limiting and do not always give the client an opportunity to express himself fully. 1 Am Jur Trials 1, Interviewing the Client § 11.

40. Practice References: For checklists for obtaining general information regarding client see 1 Am Jur Trials 1, Interviewing the Client § 17; Danner & Toothman, *Trial Practice Checklists* (1989) § 1:10; Swartz & Swartz, *Handbook of Personal Injury Forms & Litigation* (1982) § 1:2.

41. Practice References: Interview form for medical malpractice, see Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986), Appendix E, pp 1121 et seq.

■■■■ *Observation:* The attorney contemplating representation of a medical malpractice plaintiff may want to schedule the second phase of the interview some time after the first to allow the attorney to research all unfamiliar aspects of the medical problem; then, the attorney can ask educated questions to pin down the precise nature and extent of the problem. It should be

personal injuries,⁴³ products liability,⁴⁴ divorce,⁴⁵ etc.

§ 10. Function and obligations of attorney

The function and role of the attorney engaged in interviewing a client is to be a detached, impartial listener and to maintain disciplined control over expression of any feelings that may be affected by what the client says, while at the same time presenting an attitude of intellectual and emotional understanding of the client's situation.⁴⁶

If gaps or weaknesses in the client's story appear, the attorney may direct some further specific questions to the client.⁴⁷ The attorney must keep in mind the tendency to exaggerate and occasionally distort facts by a client eager to impress the attorney with the seriousness of his claim; ready acceptance of the representations may lead to embarrassing situations during any subsequent trial.⁴⁸

■■■■ Observation: Some potential clients may have a "pot of gold" mentality, while others simply want revenge or a crusader to force an entire industry or government to change its policy on certain matters; most, however, want solely to solve their individual problem. Emotional motivation can run the gamut from fearful anxiety to resigned necessity to angry indignation. The attorney must be sensitive to such expectations and attitudes, and attempt to set realistic objectives which may be achieved by the attorney and client working together.⁴⁹

explained to the client that an outside medical expert will evaluate the case before a decision is made to accept it. The client should be reminded that attorneys practice law, not medicine, and consequently the attorney cannot tell the client whether a cause of action exists based on a medical standard of care. Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7.3.

42. Law Reviews: Young, Interviewing the Claimant in a Workman's Compensation Case. 17 *Practical Lawyer* vol 17 no. 2 p 35 (Feb. 1971).

43. Practice References: For a general checklist, see Swartz & Swartz, *Handbook of Personal Injury Forms & Litigation* (1982) § 1:2.

Law Reviews: Preiser, A Crucial Technique: The Initial Client Interview in a Personal Injury Case. 18 *Trial* 23 (Dec. 1979).

44. Practice References: Products liability checklist, see Swartz & Swartz, *Handbook of Personal Injury Forms & Litigation* (1982) § 1:15.1 (supp).

■■■■ Observation: Products liability cases may involve less detailed interview questioning than medical malpractice cases because the client rarely has technical knowledge about the product that caused the injury. The client can be asked what happened, the brand name of the product, when and where the product was

purchased, the existence of any guaranties and warranties, the names and addresses of any witnesses, the medical consequences of the product malfunction, and medical bills and lost wages caused by the injury received. Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7.3.

Law Reviews: Tarantino, A Human Approach to the Initial Interview in a Products Liability Case. 31 *Prac Law* 61 (Dec. 1, 1985).

45. Law Reviews: Barrett, The Initial Interview with a Divorce Client. *The Practical Lawyer* vol 23 no. 4 p 75 (June 1, 1977).

46. Practice References: 1 *Am Jur Trials* 1, Interviewing the Client § 8; Schweitzer, *Cyclopedia of Trial Practice* 2d ed Vol 1 (1970) § 3.

47. Practice References: Schweitzer, *Cyclopedia of Trial Practice* 2d ed Vol 1 (1970) § 2.

48. Practice References: Schweitzer, *Cyclopedia of Trial Practice* 2d ed Vol 1 (1970) § 2.

49. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7:1.

Law Reviews: Oakes, A Theoretical Framework for Lawyering Behavior and Techniques of Legal Diagnosis. 14 *Prac LJ* 243, 246-254 (1983).

§ 11. Manner of questioning

The client interview should be conducted in an informal manner. Questioning is usually done in chronological order, since this is the way the event will be retold at the trial. Use of legal terminology in questioning should be avoided as much as possible since the client will probably not be familiar with such language. If questioning is conducted in this manner, a recorded transcript of the interview may be used later to determine appropriate questions to ask the client on direct examination at the trial. The system also gives the attorney a chance to detect a failure of the client to tell the whole story.⁵⁰

Recommendation: In questioning the client, the attorney should carefully distinguish between facts reported through the process of self-examination (introspection) and facts reported through the process of reviewing past events (retrospection). Self-examination involves the client's present responses to the event, whereas reviewing past events—the more valuable and reliable factfinding tool—involves the recollection by the client of his responses at the time of the event in question. Counsel should therefore frame questions to elicit responses of a retrospective nature. The attorney can encourage retrospection by simply referring to the event under discussion, by beginning a question with such phrases as “thinking back over the accident” or “as you recall the conference,” and by making it clear that the attorney is interested in past response. This should be done at the beginning of the interview, when it serves to focus the client's attention on what he or she experienced and helps to establish a pattern for the interview.⁵¹

§ 12. Interview as to injury

In accident cases the plaintiff's attorney must obtain, during the initial interview with the client, a detailed description and enumeration of the client's injuries.⁵² In medication or birth-related injury cases, an exhaustive family medical history⁵³ or a prenatal and birth history⁵⁴ may be required.

This interview is commonly close in point of time to the event leading to the injuries, and the plaintiff's recollection of the extent of injury and pain and suffering involved will be comparatively fresh in his or her mind.⁵⁵ At this time a complete and graphic record should be obtained regarding these important items of damages, although such information should be compared, as the case proceeds to trial, with medical records, police reports, and other objective data that will be available at later stages of the case.

Recommendation: It is important for the attorney to keep up to date with the client's physical state, since the injuries may still be developing at

50. Practice References: 1 Am Jur Trials 1, Interviewing the Client §§ 14, 15.

51. Practice References: 1 Am Jur Trials 1, Interviewing the Client § 16.

52. Practice References: Checklist of questions to obtain general information concerning claim of client involving personal injury, see 1 Am Jur Trials 1, Interviewing the Client § 28.

53. Practice References: Family medical history checklist, see Swartz & Swartz, Hand

book of Personal Injury Forms & Litigation (1982) § 1:3.1 (supp).

54. Practice References: Prenatal and birth history checklist, see Swartz & Swartz, Handbook of Personal Injury Forms & Litigation (1982) § 1:3.2 (supp).

55. Generally as to discussion of client's pain and suffering during the interview, see 1 Am Jur Trials 1, Interviewing the Client §§ 26, 27.

Practice References: Pain questionnaire, see Swartz & Swartz, Handbook of Personal Injury Forms & Litigation (1982) § 1:3.

the time of the initial client interview, and may increase during the pretrial period.⁵⁶

■■■■ **Caution:** The client should be warned that his claim must be consistent with his present ability to engage in physical activities, and that the opposing party may keep him under observation, or even take surveillance movies of him, in order to compromise or weaken the case at the trial level.⁵⁷

§ 13. —Authorizations and requests for release of information

In order to accurately evaluate the personal injury claim, counsel must obtain access to all official reports, medical records, doctors' reports, and medical bills. To do this the client must execute authorization forms at the initial meeting.⁵⁸ The attorney may then proceed to send requests for abstracts or copies of hospital records,⁵⁹ physicians' records and reports,⁶⁰ medical bills,⁶¹ dates of absence from employment,⁶² accident reports,⁶³ or reports from vehicle regulatory agencies.⁶⁴

■■■■ **Reminder:** The information obtained through the medical authorization must be kept confidential even if representation of the client is eventually declined.⁶⁵

§ 14. —Defense inquiries

Seldom can defense counsel obtain accurate and complete information from his client regarding the nature and extent of the plaintiff's injuries. For the most part, defense counsel's data as to the plaintiff's injuries will be compiled from information supplied by investigators, by examination of medical and other reports, by interviewing witnesses, and by the proper use of discovery procedures. Still, the defendant's attorney should ask his client every question that the client will be in a position to answer as to the extent of plaintiff's injuries. Counsel should determine the plaintiff's appearance immediately after the accident and should ask about any remarks made by the plaintiff concern-

56. Practice References: 1 Am Jur Trials 1, Interviewing the Client § 19.

57. Practice References: 1 Am Jur Trials 1, Interviewing the Client § 19.

58. Forms: Authority to release information and medical records to attorney, see 9A Am Jur 2d Legal Forms 2d, Hospitals and Asylums §§ 136:113, 136:114; 15 Am Jur Legal Forms 2d, Physicians and Surgeons § 202:177.

Practice References: 1 Am Jur Trials 189, Processing the Case § 9. Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) §§ 1:6, 1:7.

Authority to examine medical records, see Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986), Appendix G, p 1127.

59. Forms: Request for abstract or copy of hospital records, see Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) §§ 1:8, 1:9.

60. Forms: Request for physician's records and reports, see Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) §§ 1:10, 1:11.

61. Forms: Request for medical bills, see Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) § 1:12.

62. Forms: Request for dates of absence from employment, see Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) § 1:13.

63. Forms: Request for accident report, see Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) § 1:14.

64. Forms: Request for report from vehicle regulatory agency, see Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) § 1:15.

65. Practice References: Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 7.3.

ing his condition. He should ask the defendant whether the plaintiff appeared to be in pain, whether he lost consciousness, and whether he was able to remain upright. He should find out whether the plaintiff was taken to the hospital, whether he accepted or refused treatment, and whether there were external signs of bleeding.⁶⁶

§ 15. Criminal cases

The most important discussion that the attorney will have with a client in a criminal case will be the initial interview, because it will establish whether or not the attorney-client relationship is to be grounded on mutual confidence, trust, and respect. Counsel should not talk extensively with the client on the phone; if the client calls immediately after arrest, he should be asked to reveal nothing except his location, and counsel should not discuss any additional details at that time. The client should be strictly enjoined from signing anything or discussing anything with anybody until the attorney or his associate, properly identified, visit him. An early interview is best.⁶⁷ Counsel should then speak to the arresting officer in charge, find out the precise nature of the charges, and insist that the police note counsel's visits.⁶⁸

At the initial interview with the client, it is important to clearly establish the respective roles of the attorney and the client, to again warn the client to speak and write nothing, and to warn the client against possible police efforts to undermine the client's confidence in the attorney.⁶⁹

Interviewing witnesses and suspects by the prosecution's investigators is discussed elsewhere.⁷⁰

§ 16. —Eliciting facts

The nature of the interview with the client will, of course, be affected by the nature of the case and the surrounding circumstances. A jailhouse interview with a person having a long criminal record will differ markedly from one held in your office with a corporate executive accused of a "white collar" crime. Among the matters to discuss or keep in mind are the following:

- Obtain details of the arrest
- Remember that the client's story may change with time and the longer he remains in custody, absorbing ideas from fellow prisoners as to how he should alter his story in order to absolve himself from or lessen the gravity of the charge against him
- Let no inconsistencies slip by
- Urge the client strongly to take you into his confidence
- Establish rapport before taking interview notes
- Use a disinterested interpreter if the client has difficulty with English
- Calm a nervous client by allowing him to talk freely
- Avoid much cross-examination at first

66. Practice References: 1 Am Jur Trials 1, Interviewing the Client § 20.

67. Practice References: Bailey & Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 2:1-2:4.

68. Practice References: Bailey & Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 2:5-2:7.

69. Practice References: Bailey & Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 2:8-2:10.

Law Reviews: Martin, *Interviewing the Criminally Accused: Questions of style*, 8 Student Law 46 (May 1980).

70. See § 34.

- Have the client write out his version of the facts
- Don't make early predictions
- In an office interview, establish a calm atmosphere and do not conduct it in the presence of third persons unless absolutely necessary, except for a secretary to transcribe the conversation or an interpreter
- Adapt the interview technique to the client's personality⁷¹

§ 17. Accepting or declining the case

The client's claim must be determined to be viable before the attorney agrees to handle it. The attorney should explain to the client during the client interview that the claim will be investigated and evaluated,⁷² both to determine the claim's legal and economic validity and to protect the client's interests. And the client should be told that there will be prompt notification of the results. After investigating the case, if the attorney decides to accept it, the client should sign an actual representation agreement which spells out the fees to be charged, the costs to be paid by the client and when, and the respective duties and responsibilities of each party. Then, without delay, the suit should be filed, important depositions scheduled, and other discovery undertaken.⁷³

■■■■ Reminder: Although ordinarily the authority of an attorney begins with the retainer, the relation of attorney and client is not dependent on the payment of a fee, or the execution of a formal contract; the existence of the contract and the relationship may be implied from the conduct of the parties.⁷⁴ Thus, the initial contact between the attorney and the client establishes the attorney-client relationship. Indeed, the existence of the relationship need not even depend on the attorney's acceptance of the case. Courts have held that even prospective clients are owed fiduciary duties as a result of the initial contact with the attorney, and this duty attaches even if the attorney ultimately declines to represent the individual.⁷⁵ Cases have also generally held that an attorney-client relationship exists on the basis of an authority-to-investigate form⁷⁶ signed by the prospective client.⁷⁷

If the attorney decides to reject the case, a uniform method of rejection should be adopted. Rejection should be clear so that the client will have no

71. Practice References: Bailey & Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 2:11-2:23.

Law Reviews: Check List for First Interview With Criminal Defendant. 37 *Tenn L Rev* 701 (Summer 1970).

Forms: Sample form to be used in initial interview. Bailey & Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) § 2:24.

72. Generally as to evaluation of the case, see §§ 38 et seq.

73. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 7.4.

74. See 7 Am Jur 2d, *Attorneys at Law* § 118.

75. *Westinghouse Electric Corp. v Kerr-*

McGee Corp. (CA7 Ill) 580 F2d 1311, 1978-2 CCH Trade Cases ¶ 62169, cert den 439 US 955, 58 L Ed 2d 346, 99 S Ct 353 and (disapproved on other grounds by *Firestone Tire & Rubber Co. v Risjord*, 449 US 368, 66 L Ed 2d 571, 101 S Ct 669, CCH Fed Secur L Rep ¶ 97816, 1980-81 CCH Trade Cases ¶ 63796; *King v King* (4th Dist) 52 Ill App 3d 749, 10 Ill Dec 592, 367 NE2d 1358; *Kurtenbach v Te Kippe* (Iowa) 260 NW2d 53; *Togstad v Vesely, Otto, Miller & Keefe* (Minn) 291 NW2d 686.

76. Forms: Authority of attorney to investigate claim. Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986), Appendix F, p 1125.

77. *Miller v Metzinger* (2nd Dist) 91 Cal App 3d 31, 154 Cal Rptr 22; *De Vaux v American Home Assur. Co.*, 387 Mass 814, 444 NE2d 355.

reason to doubt that the attorney has turned down the case. Flatly informing the client only that the case is without merit is inadvisable. The attorney should briefly explain the reasons to the prospective client. To preserve a record of the content of the rejection and the fact that it was communicated, the attorney should also mail the would-be client the rejection in writing. This writing should concisely reiterate the reason the claim was rejected, including, if possible, a brief summary of what the investigation revealed. The applicable statute of limitations should be set out, and, if prompt action must be taken to preserve the claim, the rejected client should be told so and advised to consult another attorney in a timely fashion if he or she wishes to pursue the claim further. All documents and other property the rejected client has given the attorney must be returned. A copy of the rejection letter should be entered in the permanent file.⁷⁸

■■■ Recommendation: It is a good idea to memorialize the interview, especially the rejection of the case, and to maintain these records in a “rejected cases” file.⁷⁹

B. PROCESSING THE CASE [§§ 18–22]

Research References

1 Am Jur Trials 189, Processing the Case; 4 Am Jur Trials 411, Sample Settlement Brochure

Charfoos and Christensen, Personal Injury Practice: Technique and Technology (1986), Appendices C, D

Danner and Toothman, Trial Practice Checklists (1989) §§ 1:10(F), 7:90

Purver, Young, Davis, and Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) Ch 4

§ 18. Generally; master controls and aids

A case processing system can contribute significantly to the effective use of an attorney's time and legal talent. The basis of the program is to establish an office system with a support staff equipped to handle the general details of trial programming and management. For each type of case handled in the office that lends itself to pattern treatment—will contests, divorce proceedings, particular contract disputes, personal injury actions, and the like—an office system can be constructed to process the case, assuring that no important detail is overlooked and that every facet of the case is pursued to a proper and satisfactory conclusion.⁸⁰

In order to make certain that the client's case is processed smoothly, certain permanent features of the office system must be maintained apart from the client's file. These master processing controls and aids may include the following:

78. Practice References: Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 7.4.

See also Danner & Toothman, Trial Practice Checklists (1989) § 1:10, stating that if counsel is unable or unwilling to handle the case, the alternatives are to advise the client to drop the

matter or resolve it without a lawyer's help or to refer the client to another attorney.

79. Practice References: Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 7:1.

80. Practice References: 1 Am Jur Trials 189, Processing the Case § 1.

- An office manual containing detailed descriptions of various items and procedures in the office processing system
- A master directory containing the alphabetical listing of all current cases in the office, followed by a listing of all cases that have been disposed of, and concluding with a listing of all the resource folders in the office processing system
 - Client file numbers consisting of a special series of file numbers set aside for the exclusive use of current cases being handled in the office
 - Current case listings
 - Closed case listings, with client's surname first followed with the designation "D" if the office represented the defendant and the year in which the case was concluded
 - Resource file listings, an alphabetical list of the names and locations of all the different types of case management files, tools, and indexes
- Resource files based on materials compiled from the attorney's practice, including source books, collections of articles, charts, digests, citations, forms that have been used successfully in the past, etc. The files may include the following:
 - Technical folders on specific matters such as products liability, medical malpractice, automobile accidents, etc.
 - Law folders containing significant local decisions or key cases from federal and other state jurisdictions, case citations, etc.
 - Forms folders arranged and classified alphabetically
 - Information index providing a means of locating all of the above data, and consisting of either a card file or a computerized system permitting on-screen search and retrieval
- Master diary listing for each particular date all items that must be disposed of or rescheduled in the office on that day, including appointments, phone calls to be made, pleadings or briefs requiring preparation or alteration, return date on pending suits, and actions to be taken on that particular day
- Cost accounting system consisting of separated or dual system of book-keeping for each case before the office
 - Alphabetical client ledger with all charges of the case listed, such as for depositions, medical reports, etc., and containing a running account of the bills showing a cumulative total after each new entry
 - Client account fund set up to handle payout of expenses on behalf of the client
 - Master check register showing each check that has been made out from the fund, on what particular client's behalf, and for what purpose; also shows general deposits into account⁸¹

§ 19. The client or case file

The moment a potential client comes into the office, a special file is created for such person, and every matter that will directly or indirectly concern the client's case will eventually be channeled into this file.⁸²

81. Practice References: 1 Am Jur Trials 189, Processing the Case §§ 15-30.

jury Practice: Technique and Technology (1986), Appendix D.

Forms: Closing disbursement sheet and check request. Charfoos & Christensen, Personal In-

82. Practice References: 1 Am Jur Trials 189, Processing the Case § 2; Danner & Tooth-

A central client information card index—or a computerized listing—should be maintained with a separate card or entry for each client, containing the person's name, address, phone numbers. The client's file number should be noted on the card, and space should be left in which to indicate the names of the attorneys representing each side. Current case entries should be at the front or top, followed by a separate closed files section.⁸³

Particular items which should be inserted in the client's file include the following:⁸⁴

- A rough memorandum of the initial client interview
- A copy of the retainer agreement executed by the client
- A basic information sheet⁸⁵
- Notes by the attorney regarding potential sources of case data
- Authorizations for release of information signed by the client⁸⁶
- Data sheets
 - Accident data⁸⁷
 - Medical and “specials” data⁸⁸
 - Party data⁸⁹
- Completed memorandum of client interview based on rough notes of attorney

§ 20. Processing the investigation

The investigation of a case such as a personal injury claim is generally initiated by sending out a series of letters and employing the client authorizations for information.⁹⁰ A personal injury checklist may be placed in the client's file, listing the important steps of investigation to be considered in the routine processing of the case, with entries showing the date on which responses are received to standard requests.⁹¹

With the information supplied by the personal injury checklist, the attorney can estimate how much more work needs to be done in the investigation of the case and what additional resources need to be tapped. In some instances the attorney may wish to call personally on certain witnesses or to visit particular scenes in order to be certain that all details have been fully brought to light.⁹² If an official accident report has been prepared, the details stated on such document may well confirm the client's version of the events or may point up a discrepancy. From this report the attorney can take appropriate action in checking with witnesses and visiting the location in question, al-

man, Trial Practice Checklists (1989) § 1:10(F); Purver, Young, Davis, and Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) Ch 4.

83. Practice References: 1 Am Jur Trials 189, Processing the Case § 3; Rose, *File Indexing and Docket Control*, Trial, Feb. 1989, p 71.

84. Practice References: 1 Am Jur Trials 189, Processing the Case §§ 4-14.

85. Forms: Basic information sheet. Charfoos Christensen, *Personal Injury Practice: Technique and Technology* (1986), Appendix C.

86. See discussion in § 13.

87. Forms: Accident data sheet. 1 Am Jur Trials 189, Processing the Case § 11.

88. Forms: Medical and specials data sheet. 1 Am Jur Trials 189, Processing the Case § 12.

89. Forms: Party data sheet. 1 Am Jur Trials 189, Processing the Case § 13.

90. For a detailed discussion of case investigation, see §§ 23 et seq.

91. Practice References: 1 Am Jur Trials 189, Processing the Case § 31.

92. Practice References: 1 Am Jur Trials 189, Processing the Case § 32.

though it is sometimes preferable to delegate the task of obtaining accident reports and checking out the details as stated therein. Witnesses named in the report should be called to arrange appointments so that they may be interviewed.⁹³

If the attorney's office failed to contact persons who should have been interviewed in the preliminary stage of investigation, or if, for other reasons, it was not feasible to reach them at that time, the staff should send out notices and requests for appointments, and this procedure should be checked regularly until all replies are received. A control system in the form of a suspense file should be created for the express purpose of checking on investigative correspondence in the case, with a copy of each request for information inserted in the file as well as a copy of each reply.⁹⁴

Requests for interviews or information in an accident case may be sent to any or all of the following:⁹⁵

- Attending police officer⁹⁶
- Motor vehicle department⁹⁷
- Accident witnesses⁹⁸
- Physician⁹⁹
- Hospital¹
- Vital statistics bureau or health department, or coroner²
- Employer³
- Internal Revenue Service⁴
- Background witnesses⁵
- Defendant and insurer⁶

|||| Observation: In many instances, it may be necessary to send the client a letter requesting additional information prior to the second or follow-up interview with the attorney.⁷

§ 21. Processing the settlement

A settlement presentation should be mapped out with as much preparation

93. Practice References: 1 Am Jur Trials 189, Processing the Case § 33.

94. Practice References: 1 Am Jur Trials 189, Processing the Case §§ 34, 35.

95. Practice References: 1 Am Jur Trials 189, Processing the Case §§ 36-45.

96. Forms: Letter requesting interview with attending police officer. 1 Am Jur Trials 189, Processing the Case § 36.

97. Forms: Letter requesting information regarding accident. 1 Am Jur Trials 189, Processing the Case § 37.

98. Forms: Letter requesting interview with witness to accident. 1 Am Jur Trials 189, Processing the Case § 38.

99. Forms: Letter to attending physician requesting execution of hospital release and copies of medical and X-ray reports. 1 Am Jur Trials 189, Processing the Case § 39.

1. Forms: Letter to hospital requesting copies of records. 1 Am Jur Trials 189, Processing the Case § 40.

2. Forms: Letter to vital statistics bureau requesting copies of death records. 1 Am Jur Trials 189, Processing the Case § 41.

3. Forms: Letter to employer requesting plaintiff's work records. 1 Am Jur Trials 189, Processing the Case § 42.

4. Forms: Letter to IRS requesting copies of plaintiff's tax records. 1 Am Jur Trials 189, Processing the Case § 43.

5. Forms: Letter requesting interview with background witness. 1 Am Jur Trials 189, Processing the Case § 44.

6. Forms: Letters to adverse party and his claims adjuster. 1 Am Jur Trials 189, Processing the Case § 45.

7. Forms: Letter requesting follow-up information from client. 1 Am Jur Trials 189, Processing the Case § 46.

as if the case were about to be argued to the jury.⁸ A settlement brochure⁹ should be prepared, containing a statement of the necessary facts and conclusions of law, excerpted from the case file.¹⁰ The brochure may also contain medical reports, an itemization of medical specials, and a settlement facing sheet.¹¹ The brochure is left with the adversary along with a demand.

Closing the settlement after an accord is reached between the parties involves preparation of a settlement statement, execution of a release (generally proposed by the insurance company and accepted by the attorney), distribution of the recovery, and closing the client's file with a notation of settlement.¹²

§ 22. Pretrial processing

The various memoranda placed in the client's file pertaining to the specific allegations and other information regarding the case will be useful in the pretrial stages of the case, which involve the preparation and filing of the complaint and interrogatories, requests for admissions or production of documents, motions for physical or mental examination, depositions, and the pretrial conference.¹³ Arbitration and other alternative dispute resolution procedures may also be invoked.¹⁴

C. INVESTIGATING THE CASE [§§ 23-37]

Research References

Index to Annotations, Investigations and Interrogations; Preparation

1 Am Jur Trials 357, Investigating the Civil Case: General Principles; 1 Am Jur Trials 481, Investigating the Criminal Case: General Principles; 1 Am Jur Trials 555, Locating and Preserving Evidence in Criminal Cases; 2 Am Jur Trials 1, Investigating Particular Civil Actions; 2 Am Jur Trials 171, Investigating Particular Crimes; 2 Am Jur Trials 229, Locating and Interviewing Witnesses; 2 Am Jur Trials 293, Locating Scientific and Technical Experts; 2 Am Jur Trials 357, Locating Medical Experts; 2 Am Jur Trials 357, Locating Public Records

Bailey and Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985), Chs 3-6, 20, 27-32

Charfoos and Christensen, Personal Injury Practice: Technique and Technology (1986), Chs 9-11; Appendix B

Danner and Toothman, Trial Practice Checklists (1989), Ch 2

Purver, Young, Davis, and Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) Ch 4 et seq.

Robb, Philo, and Goodman, Lawyers' Desk Reference (4th ed)

Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) §§ 1:22-1:28

8. Practice References: 1 Am Jur Trials 189, Processing the Case § 52.

—Checklist—Negotiation and settlement. Danner & Toothman, Trial Practice Checklists (1989) § 7:90.

9. Forms: Sample settlement brochure. 4 Am Jur Trials 411, Sample Settlement Brochure.

10. Practice References: 1 Am Jur Trials 189, Processing the Case § 52.

11. Practice References: 1 Am Jur Trials 189, Processing the Case §§ 53-55.

12. Practice References: 1 Am Jur Trials 189, Processing the Case §§ 56-59.

13. Practice References: 1 Am Jur Trials 189, Processing the Case §§ 60-67.

For more detailed discussion of such matters, see 23 Am Jur 2d, Depositions and Discovery; 61A Am Jur 2d, Pleading; 62A Am Jur 2d, Pretrial Conference and Procedure.

14. See 5 Am Jur 2d, Arbitration and Award; 5 Am Jur 2d New Topic Service, Alternative Dispute Resolution.

1. CIVIL CASES [§§ 23-31]

§ 23. Generally

Case investigation has two purposes: to obtain the facts, and to gather evidence that can be presented at the trial or used in settlement.¹⁵ Nowadays, investigating a prospective lawsuit is often a techno-legal activity, that is, the recognition of and the response to the interface of the technical and legal aspects of a case, such as a personal injury or products liability claim; increasingly, the law firm must become learned in those technical fields in which it litigates.¹⁶

Of course, it is good experience for attorneys to do their own investigations, particularly early in their careers.¹⁷ However, in general, it is preferable to employ a skilled independent investigator.¹⁸

|||| Observation: It should be borne in mind that the investigator, whether he is an independent operator or a member of the attorney's staff, actually represents the attorney and the client. Consequently, the investigator must be chosen carefully and have certain qualifications for the work.¹⁹

|||| Caution: Also, as noted earlier, cases have generally held that an attorney-client relationship exists on the basis of an authority-to-investigate form signed by the prospective client.²⁰

Proper case investigation requires a knowledge of available sources, thorough preparation and planning by the attorney, cooperation with opposing counsel or the insurance adjuster, avoidance of perpetual and memory distortions by witnesses, and careful interviewing of the plaintiff, defendant, and other witnesses.²¹

Detailed discussion and recommendations regarding the investigation of particular civil actions, including claims involving general public liability, products liability, professional (malpractice) liability, and automobile liability, will be found in another work.²²

15. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles § 1.

16. Practice References: Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 9:1.

17. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles § 3; Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 10:1.

18. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles § 2; 2 Am Jur Trials 229, Locating and Interviewing Witnesses §§ 2, 3; Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 10:1.

19. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles §§ 2, 4.

20. See § 17.

21. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles §§ 5-14.; Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) §§ 9:1-9.4, 10.4.

Forms: Basic information sheet (for investigation files only). Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986), Appendix B; Danner & Toothman, Trial Practice Checklists (1989) §§ 2:10 (preliminary investigation strategy checklist), 2:20 (factual investigation checklist).

22. Practice References: 2 Am Jur Trials 1, Investigating Particular Civil Actions §§ 2 et seq.

Law Reviews: Miller, Investigating Slips and Falls: The Complex Dynamics Behind Simple Accidents. 24 Trial 49 (Dec. 1988).

§ 24. Obtaining physical and documentary evidence

The physical evidence at the scene of an accident, sometimes referred to as the "physical facts," includes not only the objects involved in the accident, but also the surrounding area. An examination of the scene can often help to determine how an accident happened and the accuracy of the statements of a witness who described it. Obviously, promptness in visiting the scene is extremely important, since conditions can and do change. The investigator should carry a camera and tape measure or be able to make rough diagrams that can be refined later.²³

If the object that caused the accident can be preserved, it should be taken into custody. It must be marked for positive identification and stored carefully. If it cannot be preserved, other types of demonstrative evidence will have to be employed.²⁴

Physical or documentary evidence may include diagrams, photographs, reports, advertising and instructional material, newspaper reports, and laboratory tests.²⁵ Documentary evidence may also include various types of public records.²⁶

§ 25. —Medical information

In the personal injury case, it is vital, of course, to thoroughly investigate the medical issues, which will require obtaining and analyzing relevant medical records, engaging in enough research so that counsel has some familiarity with the matter, and consulting medical experts.²⁷ The collection of medical information which will be important in the investigation, evaluation, and subsequent preparation of a personal injury case may include many of the following:²⁸

- Attending doctor's report
- Dentist's report
- Hospital records and reports
- Nurses' reports
- Autopsy reports
- Veterans' records
- Physical examinations

§ 26. —Consumer product information

Attorneys can obtain information on consumer product matters from the Consumer Product Safety Commission when a personal injury is caused by a

23. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles § 15.; Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 10.3.

24. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles § 16.

25. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles §§ 17-32. For suggestions regarding computerization of data involving physical and documentary evidence as part of an "evidence inventory" database, see Charfoos & Christen-

sen, Personal Injury Practice: Technique and Technology (1986) § 10.3.

26. Practice References: 2 Am Jur Trials 357, Locating Public Records §§ 1-29 (introduction; particular records), 30-80 (state directory).

27. Practice References: Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) §§ 11:1 et seq.

—Hurr, Uncovering Evidence in Medical Records, 25 Trial # 9, p 70 (Sept. 1989).

28. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles §§ 80-86.

product. The Commission has statistical data on various types of products and injuries, complaint files, consumer complaint letters, product defect notifications, and enforcement actions against any product, manufacturer, distributor, or retailer.²⁹

§ 27. Signed statements

Signed statements are of vital importance to the investigation of an accident, particularly if there is any likelihood that the accident may give rise to litigation, since such statements permanently preserve factual information, may be used as a memory refresher during the investigation or even at the trial, may sometimes be used as a substitute for a witness' personal testimony if unavailable later, can be used to discredit the witness who later attempts to change his story, and makes a witness less likely to do so as a consequence.³⁰ Many experienced investigators use an outline which will provide a chronological statement providing the necessary details.³¹ The witness should be asked to read the statement and make any corrections, after which the statement should be signed and acknowledged.³² Particular care must be taken by the investigator in taking statements of children or illiterate witnesses, and in some cases a translator's affidavit may be required.³³

While a personal interview is always favored, it may occasionally be necessary because of the distance involved or other factors to obtain a statement by mail from a witness.³⁴

Statements may be taken by a court reporter or by various types of recording devices. The admissibility of recorded telephone conversations is generally a matter of particular state decision or statute and local rules of procedure.³⁵

§ 28. Reports by investigator

It is important for the investigator to keep an orderly investigation file which presents a chronological record. Reports should be made promptly. While the reports concerning the investigation of an accident may be privileged communications, the privilege is not absolute, and the reports must be made in good faith, without malice, and avoid libelous material.³⁶

■■■■ *Practice guide:* Outline forms for reporting an accident case may be available from legal stationers and other sources. While it is not necessarily essential to follow a preprinted form, some uniformity in outlining the

29. Practice References: Swartz & Swartz, *Handbook of Personal Injury Forms & Litigation* (1982) §§ 1:22-1:28.

As to the Consumer Product Safety Commission and products liability generally, see 63 and 63A Am Jur 2d, *Products Liability*.

30. Practice References: 1 Am Jur Trials 357, *Investigating the Civil Case: General Principles* § 33.

For general principles of taking statements, see 1 Am Jur Trials 357, *Investigating the Civil Case: General Principles* § 35.

31. Forms: Outline for statement, with examples. 1 Am Jur Trials 357, *Investigating the Civil Case: General Principles* §§ 37, 38.

32. Practice References: 1 Am Jur Trials 357, *Investigating the Civil Case: General Principles* §§ 39, 40.

33. Practice References: 1 Am Jur Trials 357, *Investigating the Civil Case: General Principles* §§ 41-43.

34. Practice References: 1 Am Jur Trials 357, *Investigating the Civil Case: General Principles* § 45.

35. Practice References: 1 Am Jur Trials 357, *Investigating the Civil Case: General Principles* §§ 46-53.

36. Practice References: 1 Am Jur Trials 357, *Investigating the Civil Case: General Principles* §§ 46-53.

report permits more efficient reading and allows the reader to spot details quickly upon review.³⁷

§ 29. Locating and interviewing witnesses

Locating and interviewing witnesses is a major part of the investigator's job. Sometimes, a witness may be difficult to locate, requiring the use of various tracing methods and sources of information.³⁸

After each witness is found, the investigator should interview, and take a statement of, the witness. The main purpose is to preserve potential testimony because of the extended waiting period before trial and the increased risk that the witness may move, die, or change his story; the statement will also enable the attorney to forecast the testimony the witness is likely to give at the trial. Witnesses may be classified as friendly, hostile, or disinterested.³⁹

In some cases the interview may be conducted by the attorney, and in others by a private investigator or insurance adjuster, depending on the nature of the case. In any event, skill in interviewing techniques and proper preparation are essential.⁴⁰

■■■ Caution: Witnesses should never be interviewed in a group, because they tend to compare notes and make their stories correspond.⁴¹

Key considerations in interviewing witnesses include determination of the time and place of the interview; the nature, form, and scope of the questions; the proper handling of particular witnesses such as hostile and reluctant witnesses, child witnesses, and untruthful witnesses; and the creation of a record of the interview, whether written or by voice or even videotape recordings.⁴²

§ 30. —Scientific and technical experts

There are numerous directories and associations through which information on the location of various types of scientific and technical experts can be obtained. Experts may be available through local sources, nationwide and foreign sources, and through a number of general publications.⁴³

37. Forms: Bodily injury investigation report form. 1 Am Jur Trials 357, Investigating the Civil Case: General Principles §§ 59-72.

—Police reports. 1 Am Jur Trials 357, Investigating the Civil Case: General Principles § 73.

38. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles §§ 74, 75; 2 Am Jur Trials 229, Locating and Interviewing Witnesses §§ 4-44.

Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 10.2; Purver, Young, Davis, and Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) Ch 5.

39. Practice References: 2 Am Jur Trials 229, Locating and Interviewing Witnesses §§ 45-48.

For suggestions regarding computerization of information about witnesses as part of a general evidence database, see Charfoos &

Christensen, Personal Injury Practice: Technique and Technology (1986) § 10.2.

40. Practice References: 2 Am Jur Trials 229, Locating and Interviewing Witnesses §§ 50, 52, 53.

41. Practice References: 2 Am Jur Trials 229, Locating and Interviewing Witnesses § 54.

42. Practice References: 2 Am Jur Trials 229, Locating and Interviewing Witnesses §§ 55-87.

43. Practice References: 2 Am Jur Trials 293, Locating Scientific and Technical Experts §§ 1-4 (introduction), 5 et seq. (directory of experts).

Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 9.3; Robb, Philo and Goodman, Lawyers' Desk Reference (4th ed) (a source book for locating expert witnesses—including names, addresses, phone numbers, and specialty—and for obtaining safety information relating to negligence cases); Purver, Young, Davis, and

■■■■ *Observation:* The key to finding the correct expert for a particular case is to pinpoint the exact type of question for which an answer is desired.⁴⁴

§ 31. —Medical experts

Locating a medical expert is in some ways much easier than locating other types of scientific and technical experts, because medical experts are usually well known in their communities, and specialists can be contacted through the registry of medical boards. Local hospitals, medical associations, and other doctors are also valuable sources for the names of experts. And a number of medical fields publish their own directories on an annual or biannual basis. Of course, the qualifications of a medical expert are of great importance in determining such person's value to the attorney's case. The expert should be a physician whose special knowledge and experience renders his testimony exceptionally reliable with respect to the particular medical questions involved in the litigation.⁴⁵

2. CRIMINAL CASES [§§ 32–37]

§ 32. Generally

Criminal investigative techniques generally involve (1) the collection, preservation, processing, and presentation of physical evidence; (2) interviews with suspects, witnesses, and complainants; (3) the use of private and public records and sources of information; and (4) surveillance, stakeouts, and the use of undercover operatives and confidential informants. The sequence of steps may vary from case to case, and which techniques are employed will depend, of course, on whether the investigation is being conducted by the prosecution or defense counsel.⁴⁶

From the prosecution standpoint, it is important that the investigation be directed; the goal is to establish the *corpus delicti*.⁴⁷

Among the general principles and admonitions that are of particular interest to defense counsel are the following:⁴⁸

- Investigate thoroughly
- Have a theory of defense

Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) Ch 5.

—Feder, *The Care and Feeding of Experts*. 21 Trial 67 (June 1985); Ryder, *How Good is Your Engineering Expert?* 92 Case and Comment 14 (Jan.-Feb. 1987).

For a general discussion of expert witnesses, including their qualification to testify and particular subjects of testimony, see 31A Am Jur 2d, *Expert and Opinion Evidence*.

44. Practice References: 2 Am Jur Trials 293, *Locating Scientific and Technical Experts* § 1.

Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 9.3.

45. Practice References: 2 Am Jur Trials 357, *Locating Medical Experts*.

For a general discussion of expert witnesses, including their qualification to testify and particular subjects of testimony, see 31A Am Jur 2d, *Expert and Opinion Evidence*.

46. Practice References: 1 Am Jur Trials 481, *Investigating the Criminal Case: General Principles* § 3; 1 Am Jur Trials 555, *Locating and Preserving Evidence in Criminal Cases*; Bailey & Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) § 1:8.

47. Practice References: 1 Am Jur Trials 481, *Investigating the Criminal Case: General Principles* §§ 4, 5.

48. Practice References: Bailey & Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 1:1-1:18.

- Be prepared to alter your theory
- Be familiar with police investigation methods
- Keep in mind that evidence is more convincing than technique
- Go to the most likely sources of information first
- Speed is usually essential
- Concentrate first on sources which are perishable, mobile, or changeable
- Investigate witnesses the client thinks are essential to the defense
- Question the client thoroughly
- Visit the site of any important event relating to the case
- Retain a professional investigator if possible

Detailed discussion and recommendations regarding the investigation of particular crimes, including arson, burglary, larceny, forgery, robbery, rape, sexual assault, or molestation, homicide, vehicular homicide and injury, narcotics violations, and other crimes, will be found in other works.⁴⁹

§ 33. Physical evidence

Whether from the prosecution viewpoint or that of defense counsel, a view and search of the scene of the crime and the collection, inspection, and identification of physical evidence, including fingerprints, footprints, tire marks, fabrics, hair, blood, seminal fluids, and the like, can mean the difference between acquittal and conviction. Many scientific aids and procedures are available to analyze various types of matter.⁵⁰

§ 34. Locating and interviewing witnesses

One of the major parts of the investigative process from the defense standpoint involves locating various types of witnesses, including fact witnesses,⁵¹ medical experts,⁵² and scientific and technical experts.⁵³ Such witnesses must then be carefully and thoroughly interviewed to check those facts already known, secure new facts, and help defense counsel foresee the testimony of particular witnesses at the trial. Speed is essential; failure to quickly interview witnesses can often turn friendly ones into unwilling or hostile witnesses. Important considerations are determining the time and place of the interview, questioning the witnesses, and recording the interview.⁵⁴

Similar concepts apply in the prosecution's interviews with eye witnesses and interrogation of suspects. Planning and proper techniques are essential.⁵⁵

■■■■ Reminder: Suspects must be advised of their constitutional rights—

49. Practice References: 2 Am Jur Trials 171, Investigating Particular Crimes §§ 2 et seq.

Bailey & Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985), Chs 27-32.

50. Practice References: 1 Am Jur Trials 481, Investigating the Criminal Case: General Principles §§ 6-22; 1 Am Jur Trials 555, Locating and Preserving Evidence in Criminal Cases.

Bailey & Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985), Ch 20.

51. Practice References: Bailey & Roth-

blatt, Investigation and Preparation of Criminal Cases 2d ed (1985), Ch 3.

52. Practice References: Bailey & Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985), Ch 4.

53. Practice References: Bailey & Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985), Ch 5.

54. Practice References: Bailey & Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985), Ch 6.

55. Practice References: 1 Am Jur Trials 481, Investigating the Criminal Case: General Principles §§ 23-41.

that is, given the Miranda warning—since⁵⁶ the 5th Amendment privilege against self-incrimination, made applicable to the states by the 24th Amendment, applies to police interrogation of persons in custody.⁵⁷

§ 35. Files and records

Part of the prosecution's investigative procedures is the examination of files and records for information or evidence. These may include Modus Operandi, or M.O., Files and Known Criminal Files, records of public and private organizations, fingerprint records, and the reference collections of the FBI and large police crime laboratories throughout the country.⁵⁸

§ 36. Surveillance

Surveillance by prosecution investigators is one of the most important tools of the investigation, because it serves several purposes: obtaining evidence, supplying the basis for a search warrant, determining the activities and contacts of suspects, and hopefully, catching criminals in the act. The surveillance may be either physical (moving or stationary) or technical (electronic eavesdropping and wiretapping).⁵⁹

Although less common, surveillance is a technique equally available to the defense investigator as it is to the police.⁶⁰

§ 37. Undercover agents and informants

The use of undercover agents and confidential informants has become indispensable to the modern law enforcement investigative agency. In certain types of crime, undercover agents are employed almost exclusively; in narcotics law violations they are often the only means of collecting valid evidence against well-organized rings. Confidential informants are rarely called upon to testify, but they are invaluable in furnishing tips and leads and in identifying suspects.⁶¹

D. EVALUATING THE CASE [§§ 38–40]

Research References

Index to Annotations, Evaluation; Preparation; Trial

1 Am Jur Trials 189, Processing the Case §§ 47-51

Charfoos and Christensen, Personal Injury Practice: Technique and Technology (1986) §§ 8:1 et seq.

Danner and Toothman, Trial Practice Checklists (1989) §§ 1:10(E), 2:40

Purver, Young, Davis and Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) Ch 2

Swartz and Swartz, Handbook of Personal Injury Forms & Litigation (1982) §§ 11:19-11:21

56. See generally 21A Am Jur 2d, Criminal Law §§ 791 et seq.

57. **Practice References:** 1 Am Jur Trials 481, Investigating the Criminal Case: General Principles § 32.

58. **Practice References:** 1 Am Jur Trials 481, Investigating the Criminal Case: General Principles §§ 42-45.

59. **Practice References:** 1 Am Jur Trials 481, Investigating the Criminal Case: General Principles §§ 46-62.

60. **Practice References:** Bailey & Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985) §§ 1:19 et seq.

61. **Practice References:** 1 Am Jur Trials 481, Investigating the Criminal Case: General Principles §§ 63-70.

§ 38. Generally

After completion of the interviews and investigation phases, the attorney must evaluate the case by reviewing the investigation data, correspondence, collected memoranda, and research material accumulated.⁶² Reports by medical or technical experts should also be considered.⁶³ Furthermore, to arrive at a complete and accurate evaluation, the attorney must investigate those nontechnical intangibles that go beyond the substantive facts of the case. Thus, the characteristics and attributes of the parties, the witnesses and the evidence, the litigation environment in which the case is to be tried, and certain economic realities, must be considered as objectively as possible.⁶⁴ The key question is whether the matter may involve litigation, which raises issues as to whether the claim has legal merit and whether it would be cost-effective for the client to litigate; these matters should be discussed with the client.⁶⁵ Alternatively, the attorney and client may decide to seek a settlement.⁶⁶

■■■ Observation: Case evaluation is not a science; it cannot be determined with mathematical certainty. Many elements, from a judge's proclivities to the physical facts, can affect the final outcome. Although experience is instrumental in attaching value to certain aspects of the case, each case must be regarded as unique and evaluated separately.⁶⁷

§ 39. Measuring liability

In the ideal or paradigm case, the facts would maximize damages and minimize any question that liability exists. To construct a paradigm, it must be recognized that every personal injury case comprises three central focuses: liability, damages, and proximate cause. A paradigm case requires that all elements be satisfied by the most extreme circumstances. In the archetype of the ideal case, the plaintiff suffers from substantial, permanent injuries as a result of the morally reprehensible acts of the defendants. The defendants are two or more corporations in number and are not in a vicarious relationship with each other. While they acknowledge that damages are a consequence of the complained-of event, they each blame the other for the event and cannot agree among themselves who is responsible. In addition, each of the defendants has sufficient individual collectibility and one or more of them is absolutely liable for their wrongdoing because the act violated the "moral law." This framework can be used repeatedly to evaluate the liability component of actual cases and enable counsel to predict case results within certain

62. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles §§ 47-50; Purver, Young, Davis, and Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) Ch 2.

—Checklist for evaluating the merit and value of the matter. Danner & Toothman, *Trial Practice Checklists* (1989) § 2:40.

63. Forms: Medical expert's evaluation of medical treatment. Swartz and Swartz, *Handbook of Personal Injury Forms & Litigation* (1982) §§ 1:19, 1:20.

—Pre-complaint report of technical expert.

Swartz and Swartz, *Handbook of Personal Injury Forms & Litigation* (1982) § 1:21.

64. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 8:1.

65. Practice References: Danner & Toothman, *Trial Practice Checklists* (1989) § 1:10(E).

66. Practice References: 1 Am Jur Trials 357, Investigating the Civil Case: General Principles § 51.

67. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 8:1.

probabilities for the client.⁶⁸

§ 40. Measuring damages

Damages are a separate consideration that must be evaluated as part of the decision to accept the case.⁶⁹ Among other things, acceptance depends on whether damages are sufficient to generate adequate compensation for the plaintiff without draining the law firm's financial resources. Damages will be sufficient to achieve these goals if they are, as the paradigm case indicates,⁷⁰ permanent and substantial. In a given case, possible damages can run the gamut from those that are not permanent at all, to those that are permanent but minor, to those that are both permanent and substantial. The whole person is the measure of damages. However that person is reduced by the injury, physically or mentally, generates the damage figure. For evaluation purposes, therefore, the key is to look at the reduction and attach some numerical value to it. For example, death may be said to reduce a life to zero, while loss of sight might reduce the value of life considerably but not so much as death. The full value of individual lives vary, and are affected by a number of criteria such as age, state of health prior to injury, social position, earning capacity, and familial relations. Thus, in evaluating damages, the attorney should also ask how the injury has affected the individual plaintiff's way of life.

Two broad categories imposed by the law of damages are general and special damages.⁷¹ General damages are the natural and necessary result of the wrongful act complained of, and would include pain and suffering, while special damages arise from the special circumstances of the case as the natural but not the necessary result of the injury, and would consist of the medical or hospital bills and the lost or diminished earning capacity that the plaintiff incurred as a result of the injury. Lawyers have traditionally figured that a case is worth 2 to 5 times its special damages, but legal commentators now recommend that this formula be applied only to evaluate the smaller cases. The plaintiff's attorney should resist this approach particularly when damages are susceptible to the type of proof that technological support can unearth and provide. The better approach is to evaluate each element of the case separately as it contributes to the total reduction of the value of the plaintiff's life. Because each case differs, it is impossible to arrive at a rigid formula to apply in all cases.⁷²

■■■■ Observation: The computer offers great potential in case evaluation. At least one major corporation has developed in-house a program that its law department uses to measure the cost of defending a suit brought against it. The corporation has developed similar programs to determine the value of any suit the company brings as a plaintiff and the probability of winning either such suit. And there are some services that use computer programs to evaluate economic loss in personal injury and wrongful death cases for any attorney willing to pay the fee. The attorney can

68. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 8:2.

69. As to general principles governing the recovery of damages, see 22 Am Jur 2d, *Damages* §§ 4 et seq.

70. § 39.

71. For a broad discussion of general and special damages, see 22 Am Jur 2d, *Damages* §§ 36 et seq.

72. Practice References: Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 8:3.

perform similar calculations on the office computer with software that has a math package, such as spreadsheet analysis software.⁷³

■■■■ Recommendation: During case work-up, use of an economist should be considered in cases of substantial permanent injury to determine what impact certain economic principles will have on the estimate. The economist converts the conjecture of the initial, rough estimate into a mathematical probability, thereby giving the damage claim greater reliability.⁷⁴

E. PREPARING FOR TRIAL [§§ 41-59]

Research References

Index to Annotations, Preparation; Trial

2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses; 2 Am Jur Trials 669, Preparing and Using Maps; 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases; 3 Am Jur Trials 335, Preparing and Using Photographs in Criminal Cases; 3 Am Jur Trials 377, Preparing and Using Models; 3 Am Jur Trials 427, Preparing and Using Experimental Evidence; 3 Am Jur Trials 507, Preparing and Using Diagrams; 4 Am Jur Trials 253, Use of Medical Consultants; 5 Am Jur Trials 89, The Trial Brief

Bailey and Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985), Chs 7-10, 12, 13

Carlson, Successful Techniques for Civil Trial (1983) § 8:19

Charfoos and Christensen, Personal Injury Practice (1986) §§ 3.8, 16.4-16.7

Danner and Toothman, Trial Practice Checklists (1989) §§ 1:40, 7:10 et seq.

Purver, Young, Davis and Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) Chs 8, 11

Schweitzer, Cyclopedia of Trial Practice 2d ed, Vol 1 (1970) §§ 123, 124-129, 130-134

Swartz and Swartz, Handbook of Personal Injury Forms and Litigation (1982) §§ 5:4-5:6, 6:3-6:13

1. IN GENERAL [§§ 41-49]

§ 41. Generally; checklist

A comprehensive understanding of the law and facts of the case is vital to organized trial preparation and effective presentation at trial. Besides the attorney's own preparation for trial, trial preparation includes preparation of the witnesses, exhibits, jury instructions, trial motions, and anything else that can be prepared in advance. It is during the preparation phase immediately before trial that most cases are also settled; visibly aggressive trial preparation can help to convince the opponent to settle on favorable terms.⁷⁵

■■■■ Checklist of counsel's trial preparation strategy and procedure⁷⁶

- Have a plan and schedule for trial preparation

73. Practice References: Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 8:3.

75. Practice References: Danner and Toothman, Trial Practice Checklists (1989) § 7:10.

74. Practice References: Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 8:4.

76. Practice References: Danner and Toothman, Trial Practice Checklists (1989) § 7:10.

- Employ factual investigation and discovery as the primary methods for obtaining evidence for trial
- As preparation proceeds, consider creating a detailed factual narrative or outline of the case
- Refine the theory of the case to reconcile both counsel's position and the opponent's likely position as new information becomes available
- Test the theory constantly against the facts and adjust as necessary
- Do legal research to determine what facts must be proved to establish the theories of all parties, although many of the facts necessary to prove each party's case may be obvious
- Remember that a fact that cannot be proved by admissible evidence is of no use and, if crucial, may result in losing the case
- To assess the significance of a given fact and to determine what facts have been overlooked in preparation, outline the likely closing argument, which may summarize the proof at trial according to the theory of the case
- View the case as it will be viewed by the judge and a lay jury
- Avoid discovery and motions that are not cost-effective for the client by keeping in mind each party's theory
- As evidence is accumulated, anticipate how it will be presented at trial to insure that any necessary evidentiary foundations are available for trial

Once the trial is scheduled, counsel should arrange preparation meetings with the client and each cooperative witness; prepare and serve subpoenas on uncooperative witnesses; depose witnesses who will be unavailable for trial; prepare a trial brief, motions in limine, an exhibit list, jury instructions, deposition digests or indexes, and designations of portions of depositions to be offered at trial (exchange with opposing counsel if required by the court); prepare extra copies of exhibits and depositions for easy access at trial; and prepare in advance any exhibits to be created especially for trial.⁷⁷

§ 42. Trial simulations; mock juries

To fully prepare for the possible range of jury reactions to their presentation of the case, attorneys have adopted several techniques that simulate various aspects of a trial. These techniques, alternately described as trial simulations, mock or "shadow"⁷⁸ juries, or mock trials, range from simple, one-evening summations to elaborate recreations of the trial setting and process. Through any of these techniques, the attorney can elicit both individual feedback from each "juror" and feedback from the group by initiating and observing a discussion of the issues in the case. The number of mock jurors can vary, although six should be treated as the minimum when time and finances permit. The attorney should have at least one knowledgeable advocate for each side (typically another attorney in the office) to present a combined opening and closing statement. These proceedings can occasionally be more helpful if videotaped. The simulation, to provide optimal benefit, should not only evaluate the substance of the case but also the attorney's

77. Practice References: Danner and Toothman, *Trial Practice Checklists* (1989) § 7:10.

Branson, *Innovative Trial Techniques*, *Trial*, Feb. 1989, p 63; Schaefer, *Low-Cost Shadow Juries*, *Trial*, Dec. 1986, p 58.

78. Practice References: Branson and

performance in presenting it. The value of a trial simulation lies not in whether the jury reaches the "right verdict," but in the insight the attorney gains into lay people's reactions to the issues of the case.⁷⁹

In lieu of a full mock trial, simulations may involve a small focus group of mock jurors who are presented key elements of a case, and then discuss their reactions to that case. The keys to conducting a valid jury focus group are: (1) selection of a proper research site (*not* the law office conference room or the facilities of any of the parties involved in the litigation); (2) careful recruitment of the mock jurors (select only those who would be qualified to serve as jurors in the real trial); (3) proper presentation of the case (limit to major issues); (4) videotaping the mock jury's deliberations and doing an in-depth analysis later; (5) having a skilled jury psychologist leading the juror discussion during their deliberations.⁸⁰

§ 43. Preparing witnesses in civil cases

Trial witnesses are the vehicles for presenting counsel's case. Everything a witness says under oath, unless stricken from the record, becomes evidence. There are two things for counsel to keep in mind throughout witness preparation. First, the witness probably knows little about the case, his or her role, and general trial procedures, so counsel should constantly review the situation from the witness' perspective. Second, the goal of witness preparation, and testimony at trial, is to persuade the jury and judge that the client should prevail.⁸¹

Thorough preparation of each cooperative witness is important. The amount of time spent in preparation depends on the witness's importance to the case. Preparation should improve the witness's trial performance by reducing anxiety, explaining trial procedures, describing the purposes of the trial, explaining the case and how the witness's testimony fits into the case, giving the witness an idea of the questions that counsel and opposing counsel will ask, and practicing typical questions and answers.⁸²

Usually the client will testify at trial and be one of the most important witnesses. Preparing the client to testify begins with the same preparation any witness would receive. In addition, the client will usually sit in the courtroom with counsel throughout the trial and must be prepared for this as well.⁸³

■■■■ **Reminder:** Counsel should explain that anything the client says may be treated as an admission, which could even support an adverse directed

79. Practice References: Charfoos and Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 16:4; Mulroy, *Getting an Edge with Mock Juries*, 7 *National LJ*, Sept. 24, 1984, at pp 15, 16; Cahn, *Winning Big Cases with Trial Simulations*, 69 *ABA J* 1073 (1983).

80. Practice References: Patterson, *Trial Simulation: Testing Cases with Mock Juries*, *National LJ*, July 24, 1989, pp 26, 27.

81. Practice References: Danner and Toothman, *Trial Practice Checklists* (1989) § 7:30; Purver, Young, Davis, and Kerper, *The Trial Lawyer's Book: Preparing and Winning*

Cases (1990) Ch 11; Schweitzer, *Cyclopedia of Trial Practice* 2d ed, Vol 1 (1970) §§ 130-134; Valponi, *Preparing Novice Witnesses for Deposition*, 24 *Trial* 67 (May 1988); Hamlin, *Preparing a Witness to Testify*, 71 *ABA J* 80 (April 1985).

82. Practice References: Checklist for trial witness preparation. Danner and Toothman, *Trial Practice Checklists* (1989) § 7:30(B).

83. Practice References: Checklist for preparation of client for trial. Danner and Toothman, *Trial Practice Checklists* (1989) § 7:40.

verdict. But impress on the client the necessity for testifying truthfully, even to facts which seem harmful or uncomfortable.⁸⁴

§ 44. —Expert witnesses in general

The expert's testimony will undoubtedly be a high point in the case. A well prepared expert may win the battle of the experts before the judge and jury. An expert who has not been properly prepared may be barred by the judge from testifying if the proper foundation to qualify the expert is not provided.⁸⁵

Expert preparation may begin with the same preparation any witness would receive.⁸⁶ Often, however, the expert must prepare counsel as much as counsel will prepare the expert, since counsel must become comfortable with the concepts behind the expert's testimony, any special terminology must be understood and correctly pronounced by counsel, and counsel's knowledge must be sufficient to understand any unexpected turns in the trial evidence and the expert must be prepared for each possible course the trial might take. Since the primary difference between expert testimony and the testimony of most other witnesses is the expert's ability to give opinion testimony, the expert must be aware of the limitations on opinion testimony.⁸⁷

■■■■ *Observation:* If the expert has been assisting in discovery and trial preparation, preparing to testify should be much simpler.⁸⁸

■■■■ *Recommendation:* The expert should be shown depositions of opposing experts and all exhibits relied on or prepared by the opposing expert, since this may help counsel to prepare both the expert's direct examination and the opposing expert's cross-examination,⁸⁹ and the expert may detect shortcomings in the opposing expert's qualifications that counsel would not spot.⁹⁰

Aside from the trial exhibits any witness might use, the expert may use or create exhibits to illustrate testimony, explain difficult concepts, or summarize

84. Practice References: Checklist for preparation of client for trial. Danner and Toothman, Trial Practice Checklists (1989) § 7:40.

85. Practice References: Checklist for trial witness preparation. Danner and Toothman, Trial Practice Checklists (1989) § 7:50; 2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses; Suplee and Woodruff, The Pretrial Use of Experts, 33 Practical Lawyer 9 (Sept. 1987); Berg, Counsel's Responsibility in Preparing Experts, 29 For the Defense 28 (July 1987); Postol, A Legal Primer for Expert Witnesses, 29 For the Defense 21 (Feb. 1987); Brown and Tachna, Dealing with the Lawyer as Expert Witness, 31 Prac Law 11 (Oct. 15, 1985); Feder, The Care and Feeding of Experts, 21 Trial 67 (June 1985).

Generally as to the qualification of expert witnesses, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 55 et seq.

86. § 43.

87. Practice References: Checklist for trial witness preparation. Danner and Toothman, Trial Practice Checklists (1989) § 7:50(A).

—Table of uses of scientific and technical testimony. 2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses § 18.

Generally as to bases and conditions of opinion evidence, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 26 et seq. (nonexpert opinion), 32 et seq. (expert opinion and testimony).

88. Practice References: Checklist for trial witness preparation. Danner and Toothman, Trial Practice Checklists (1989) § 7:50(A).

89. Practice References: Checklist for preparation for cross-examination of an opposing expert. Danner and Toothman, Trial Practice Checklists (1989) § 7:50(C); 2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses §§ 39, 40; Berg, Is the Opposing Expert Qualified to Testify? 29 For the Defense 26 (April 1987); Lees-Haley, Challenging Plaintiff's Vocational and Economic Experts, 29 For the Defense 19 (Dec. 1987).

90. Practice References: Checklist for trial witness preparation. Danner and Toothman, Trial Practice Checklists (1989) § 7:50(A).

voluminous data. Exhibits should be planned and prepared with counsel's participation, and must be explained to counsel.⁹¹

§ 45. —Medical experts

A great percentage of judgments obtained in personal injury litigation depends purely on medical testimony, rather than on legal arguments, and medical testimony is practically imperative in a medical malpractice case, although there are exceptions to this rule. Expert medical testimony may also be required in various other types of cases, including paternity proceedings, proceedings for the commitment of a mentally incompetent person, will contests, divorce or annulment proceedings, etc.⁹² However, many physicians are reluctant to testify as experts because of the prospect of sharp probing by opposing counsel and the psychological factor that courtroom testimony is public. Such reluctance may be even more pronounced in a medical malpractice case, because it raises the issue of betrayal of professional ethics. Counsel should, therefore, explain that a person must rely on the expert's aid not only for medical help, but also for legal help in order that justice may be obtained.⁹³

An expert medical witness's preparation for trial is somewhat different from the preparation that has to be made by the attending physician, since the expert is primarily there as a repository of information in the field, rather than as a witness to observed facts. Therefore, the expert will be expected to be thoroughly conversant with all recent literature in his field, to be knowledgeable in the theoretical and practical bases for medical practice and procedures in his specialty, and to be prepared to give the jury a clear exposition of these technical matters in nontechnical language. The principal advice to be given to the doctor is that he should listen very carefully to each question and not answer until he is positive that he understands the question. Also, the expert should be told that he is required, if asked, to state whether he is being compensated for his appearance in court and, if so, the amount he is to receive without equivocation. Evasive replies will only invite further questions.⁹⁴

In preparation for direct examination, the witness must understand the full nature and extent of the proof to be made, and must be made aware of the points of conflict in the facts as they bear on the medical issue to which he testifies. The expert must be prepared to sustain his conclusions against attack based on the seemingly contrary findings and opinions of recognized specialists on the subject, and to differentiate logically the body of facts to which his opinion applies from the facts giving rise to these apparently opposed conclusions.⁹⁵ It is also vital that the doctor appreciate what the law means by the

91. Practice References: Checklist for trial witness preparation. Danner and Toothman, *Trial Practice Checklists* (1989) § 7:50(B).

Generally as to preparation of exhibits, see § 49.

92. Practice References: 2 Am Jur Trials 585, *Selecting and Preparing Expert Witnesses* §§ 13, 14; 4 Am Jur Trials 253, *Use of Medical Consultants*.

93. Practice References: 2 Am Jur Trials

585, *Selecting and Preparing Expert Witnesses* § 42.

94. Practice References: 2 Am Jur Trials 585, *Selecting and Preparing Expert Witnesses* § 48.

Creighton, *Medical Consultants: How to Find Them, How to Use Them, and What to Pay Them*, 23 *Trial* 75 (Aug. 1987).

95. Practice References: 2 Am Jur Trials 585, *Selecting and Preparing Expert Witnesses* § 49.

"cause" of a condition, which requires an understanding of the difference between the pure, fixed criteria that add up to scientific certainty and the reasonable certainty that the law requires for judgment.⁹⁶

In preparation for cross-examination, counsel should caution the medical witness to show no bias, to answer all questions concerning his interest in the case as honestly and frankly as possible, not to disparage the opinion given by another doctor although he may disagree, not to claim familiarity with certain text writers when in actuality he is not, and, most important, not to be led into making admissions inconsistent with his direct testimony unless he is actually caused to change his mind by the new questions propounded to him on cross-examination.⁹⁷

With regard to the contemplated testimony of the attending physician, he should be cautioned that too little detail in his testimony may leave the full story untold and too much inconsequential detail about matters that have no bearing on his conclusion may mar the thrust of his testimony. Preparation also envisions that the doctor should know that he will be asked about the findings on which he made his diagnosis, and that where a battery of tests was given, some of which were negative, he may state that he did not believe them to be diagnostically significant. And in preparing the attending physician for cross-examination, counsel should discuss the opponent's possible points of attack, such as the physician's qualifications, the use of books and treatises to impeach the physician, a showing of personal interest in the case, possible mitigation of injuries, and attacks on the doctor's opinions based on hypothetical questions propounded to him on direct examination.⁹⁸

§ 46. Preparing witnesses in criminal cases

The preparation of fact witnesses for the defense requires that counsel have an integrated theory of defense and that the witnesses be familiarized with their roles in the case. Counsel should focus on specific testimony with the view of how best to present it. Counsel should explain the procedures of trial and the purposes of direct examination and cross-examination.⁹⁹

In addition to the general preparation, counsel should examine all key defense witnesses individually in the same manner as will be done in court. While counsel can conduct both the direct and the cross-examination, more realistic preparation is achieved if the cross-examination is conducted by an associate. During this mock cross-examination, each witness should be confronted with every challenging question that can possibly be anticipated, with the same attitude and style that the prosecutor is apt to have. Each witness should also be alerted in advance to the kind of questions with which the prosecutor may try to trap him, and explain how to answer such questions.¹

Every witness should be made familiar with some of the basic rules of testifying, such as speaking clearly, avoiding memorization of testimony,

96. Practice References: 2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses § 50.

97. Practice References: 2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses § 51.

98. Practice References: 2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses § 53.

99. Practice References: Bailey and Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985) § 7:4.

—Taylor, Witnesses: The Ultimate Weapon, Army Lawyer (May 1987).

1. Practice References: Bailey and Rothblatt, Investigation and Preparation of Criminal Cases 2d ed (1985) § 7:5.

talking toward the jurors, listening carefully to all questions, being serious both on and off the stand, and avoiding the use of technical language.²

If counsel decides to put the defendant on the stand, he should be prepared by counsel with special care since his testimony will be scrutinized more carefully than anyone else's. He must be able to convince the jury of his innocence. The client should be the last witness to testify in order to benefit from observing the other witnesses, and to explain any inconsistencies in the presentation of the defense. The client should be told the theory of the defense and the place each witness will occupy in it. The client should know in advance what to anticipate at each stage of the trial.³

Special attention should be given to the stories of codefendants. Counsel should never represent a codefendant if there is any chance either of a conflict of interest or a conflict of testimony. If such a conflict exists, counsel should move for a severance and not call that codefendant as a witness. If there is to be a joint trial, counsel must work out strategy with the other defense attorneys.⁴

Alibi witnesses are most difficult to prepare because they are the most vulnerable to cross-examination, even when they are telling the truth. The alibi witness should be able to give a specific reason for remembering the particular date involved, such as a birthday or anniversary, which should be corroborated by some official record or certificate.⁵

Usually, the defendant's character is not an issue in a case unless he himself makes it one. Counsel must then take care in deciding whether to use any character witness, because using such a witness sometimes backfires by allowing the prosecution a chance to smear the defendant with character witnesses of its own. However, evidence of a defendant's good character can create a reasonable doubt of his guilt, even where there could otherwise be no doubt. A character witness should be prepared to explain the basis of his knowledge of the defendant's reputation, and can use negative evidence to do this, as by testifying that he has been a neighbor for many years and has never heard anything said against the defendant. Counsel should make sure that if the prosecutor asks during cross-examination if the witness has ever heard particular rumors or reports derogatory to the defendant's reputation, such inquiry should be limited to whether the witness has heard such rumors or reports, and the witness should be advised in advance that he cannot be made to answer whether he knows of a particular act of misconduct by the defendant.⁶

§ 47. —Expert witnesses

Defense attorneys in criminal prosecutions lag far behind prosecutors in

2. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 7:6, 7:11.

—Hamlin, *Preparing a Witness to Testify*, ABA Journal (April 1985); Follingstad, *Preparing the Witness for Courtroom Testimony: Modifying Negative Behavior Through Employment of Psychological Principles*, 20 Trial 50(7) (Jan. 1984).

3. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) § 7:7.

4. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) § 7:8.

5. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) § 7:9.

6. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) § 7:10.

Law Reviews: Gitchel, *Charting a Course Through Character Evidence*, 41 Ark L Rev (Summer 1988).

making full use of expert testimony, often tending to think of such testimony only in connection with an insanity defense. However, expert testimony can be of critical importance in the presentation of the defense by helping to clarify, and in some instances, determine the facts of the case. Counsel must know when an expert can help, but the expert should be used whether he testifies or not. Counsel should call on experts early in the preparation stage because the passage of time may result in the destruction of evidence.⁷

Preparation of expert witnesses involves consideration of such matters as the admissibility of the testimony, the manner of testifying, the expected nature and scope of the cross-examination, and the use of hypothetical questions.⁸

Recommendation: Whether or not the expert will testify at trial, counsel should obtain a detailed report from the expert setting forth the facts and findings in writing prior to the trial. The report should be dated and signed. This report will help counsel prepare the case for trial and its use will ensure that no information elicited from the expert is omitted by error.⁹

§ 48. Preparing the defense in criminal case

To properly present the complex criminal case to a jury or judge, defense counsel must prepare and arrange physical evidence such as photographs or experiments, documentary evidence such as deposition and grand jury testimony or graphs, and pretrial testimony. Preparation of evidence and information in a criminal trial can be time-consuming and intricate.¹⁰ The creation and use of a trial notebook in the complex case has been recommended.¹¹

Preparation of an insanity defense may involve both expert and nonexpert witnesses. The expert, usually a psychiatrist, may testify to his opinion of the defendant's mental condition in the past or at the present time on any of three bases: personal examination of the defendant, the evidence in the case, or in answer to a hypothetical question. Defense counsel should not, however, wait until the last minute to arrange for an examination of the defendant and then attempt to rely on a hurried conference to prepare the witness. Counsel should have the expert describe in great detail all facts and impressions gained during the interviews with the defendant, and should anticipate the testimony of the prosecutor's expert. By the same token, the expert should be given an opportunity before trial to question the defense attorney about the case, the time of trial, the order of witnesses, or anything else that seems relevant. Thorough preparation before trial will have mutual advantages to both the attorney and the expert, and is likely to make the expert a better and more relaxed witness at the trial.¹² The preparation of the nonexpert, or lay,

7. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 9:1 et seq.

Law Reviews: Kwall, *The Use of Expert Services by Privately Retained Criminal Defense Attorneys*, 13 *Loyola U of Chi LJ* (Fall 1981).

8. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 10:1 et seq.

9. Practice References: Bailey and Roth-

blatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) § 10:24.

10. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 12:1 et seq.

11. See § 53.

12. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 13:1 et seq.

—Guilty but Mentally Ill: A Retreat From the Insanity Defense, 7 *Am J Law and Med* 237 (1981).

witnesses for trial in a case involving an insanity defense requires much the same procedure as preparation of fact witnesses generally.¹³ The witness will usually testify to specific irrational acts he has observed committed by the defendant. It is not necessary that each witness has formed an opinion on the defendant's sanity; the cumulative effect of testimony regarding the defendant's conduct will influence a jury more than lay opinions on his sanity.¹⁴

§ 49. Preparing exhibits

Preparation of exhibits consists primarily of planning the admission and use of the exhibit at trial. In most trials, documentary evidence will be the most common form of exhibit. Counsel should make enough copies for everyone, and if the original of a document or other exhibit is unavailable, counsel should make provision to overcome a best evidence objection. Real and demonstrative exhibits have the potential for attracting more jury attention. Foundations for their admission are also different, with authentication, copying, and handling of the exhibit being somewhat more complicated.¹⁵

■■■■ Observation: For each exhibit, counsel must consider the likely objections to its admission, seek a stipulation or admission of admissibility, move for a preliminary ruling on admissibility, or plan to establish the foundation for admission if all else fails. But beyond getting the exhibit into evidence, counsel has the ultimate challenge of weaving the exhibits into the rest of the evidence to produce a persuasive case. Too many exhibits heading down too many tangents will only overwhelm and confuse the jury.¹⁶

2. TRIAL BRIEF AND OTHER TRIAL AIDS [§§ 50–59]

§ 50. Trial brief

A trial brief is usually a summary of the facts and law of the entire case, presented from one party's perspective. The brief is most helpful in bench trials, but may also assist the judge in jury trials. A well-drafted trial brief can educate and inform the judge about the issues in the case, especially those issues that have not been discussed in a previous motion. If the trial proof will be disjointed, if legal issues requiring extensive authorities will be presented, or if the case is generally complex and unorganized, the trial brief is an effective tool. The brief can be used to present and preserve legal arguments for appeal, and counsel may refer to the brief during trial as the basis for objections and oral arguments.¹⁷

13. § 46.

14. **Practice References:** Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* 2d ed (1985) §§ 13:7 et seq.

15. **Practice References:** 2 Am Jur Trials 669, *Preparing and Using Maps*; 3 Am Jur Trials 1, *Preparing and Using Photographs in Civil Cases*; 3 Am Jur Trials 335, *Preparing and Using Photographs in Criminal Cases*; 3 Am Jur Trials 377, *Preparing and Using Models*; 3 Am Jur Trials 427, *Preparing and Using Experimental Evidence*; 3 Am Jur Trials 507, *Preparing and Using Diagrams*.

Danner and Toothman, *Trial Practice Checklists* (1989) § 7:60; Schweitzer, *Cyclopedia of Trial Practice* 2d ed Vol 1 (1970) § 128.

16. **Practice References:** Danner and Toothman, *Trial Practice Checklists* (1989) § 7:60.

17. **Practice References:** Danner and Toothman, *Trial Practice Checklists* (1989) § 7:80(A); Schweitzer, *Cyclopedia of Trial Practice* 2d ed, Vol 1 (1970) § 123; Purver, Young, Davis, and Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) Ch 8.

■■■■ *Observation:* A trial brief is not the same as a motion in limine, because the motion seeks a court ruling on a specific issue while the trial brief summarizes the entire case.¹⁸ A brief is also distinguishable from a pretrial memorandum prepared by counsel for his own use.¹⁹

The structure and content of a trial brief are entirely within counsel's control. The brief may summarize the facts, especially if the judge is unlikely to be familiar with the case or the evidence will be convoluted. Any obscure or complicated legal issues may be discussed with citation of authority. Important evidence questions may also be briefed. The brief may justify any unusual jury voir dire subjects, support the qualification or disqualification of an expert, and provide legal authority to support jury instructions. The trial brief should not merely repeat the opening statement or closing argument, nor should oral argument consist of reading the brief. Unless the case really requires an elaborate trial brief, it should be short and concise, providing an overview of the facts and dealing only with the issues the judge may find unusual.²⁰

Some courts may require trial briefs to follow a particular format. If no such requirements exist, the trial brief should contain, at a minimum: (1) Table of Contents and Authorities Cited; (2) Statement of Facts; (3) Brief on Legal Questions. Some attorneys also include a digest of the pleadings, which can either be a chronological narrative or a table relating the issues of the case to admitted and denied allegations in the pleadings and any pretrial orders entered; however, such a digest should only be included in highly complex cases or in those cases where actual admitted allegations furnish a substantial foundation for the plaintiff's case.²¹

■■■■ *Practice guide:* Sample trial briefs for various types of cases and issues are available from published sources.²²

The filing of a trial brief with the court is discussed separately.²³

§ 51. —Technical or medical brief

In a technical case involving complex matters beyond the ken of the average layperson, counsel should consider supplementing the trial brief by submitting a technical brief. Such a brief should familiarize the court with standard technical rules and principles applicable to the facts that gave rise to the litigation. Its purpose is not to advocate, but to educate. In most cases, it should identify the consensus of opinion held by practitioners of a technical specialty on points pertinent to the case, which might relate to the fields of

18. *Practice References:* Danner and Toothman, *Trial Practice Checklists* (1989) § 7:80(A).

19. *Practice References:* 5 Am Jur Trials 89, *The Trial Brief* § 1.

Generally as to pretrial memorandum, see § 54.

20. *Practice References:* Danner and Toothman, *Trial Practice Checklists* (1989) § 7:80(A); Schweitzer, *Cyclopedia of Trial Practice* 2d ed, Vol 1 (1970) § 123.

21. *Practice References:* 5 Am Jur Trials 89, *The Trial Brief* §§ 6-13.

Charfoos and Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 16:6.

22. *Practice References:* 8 Am Jur Trials 57, *Condemnation of Rural Property* § 59; 9 Am Jur Trials 427, *Child-Pedestrian Accident Cases* § 22.

Swartz and Swartz, *Handbook of Personal Injury Forms and Litigation* (1982) §§ 6:4, 6:8, 6:13, 6:13.2 (medical malpractice); §§ 6:5-6:7, 6:13.1, 6:13.3 (products liability); § 6:5.1 (personal injury); § 6:5.2 (common carrier collision); § 6:9 (pre- and post-occurrence materials); § 6:10 (deposition testimony).

23. § 186.

engineering, metallurgy, environmental chemistry, toxicology, pharmacology, epidemiology, or gynecology.²⁴

The contents and structure of technical briefs vary depending on the technical areas they address. In all instances, however, the brief should at least contain a short statement of the facts, a clearly organized discussion of the technical knowledge pertaining to the case, and a cursory conclusion relating the facts to the technical discussion. The brief should also include any photographs, drawings, or other illustrations that may serve to elucidate the points made.²⁵

■■■■ Recommendation: The technical brief should not contain a list of references, either footnoted or bibliographic. Otherwise, opposing counsel could use some of this material for cross-examination, thereby benefiting from the attorney's hours of research. Any footnotes or source materials should be retained by the attorney author for his or her own use only.²⁶

In medical malpractice cases, counsel should submit both the traditional trial brief, dealing with applicable law, and a technical, medical brief, setting the proper medical frame of reference. The medical brief should educate the court about applicable medical concepts, explaining the appropriate medical standard of care and how the defendant violated that standard. The typical medical brief should:

1. Give a brief statement of facts
2. Describe the anatomy involved
3. Explain the initial medical condition
4. Describe the proper methods of diagnosis and treatment
5. Describe what the defendant did wrong medically
6. Explain the medical damage suffered by plaintiff as a result of defendant's malpractice
7. Explain what a reasonable practitioner would have done under similar circumstances
8. Provide a glossary of medical terms²⁷

■■■■ Observation: The information contained in the brief will come from interrogatories and depositions as well as medical textbooks and treatises. Most of the necessary material should already be in counsel's file when the attorney begins writing the brief.²⁸

§ 52. Trial folder

As preparation for the trial continues, the client's file may become an expandable trial folder containing separate files replacing or combining the

24. Practice References: Charfoos and Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 16:7.

25. Practice References: Charfoos and Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 16:7.

26. Practice References: Charfoos and Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 16:7.

27. Practice References: Charfoos and Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 16:7.

28. Practice References: 12 Am Jur Trials 1, *Products Liability Cases* § 80, as to preparation of a medical brief in a products liability case.

Charfoos and Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 16:7.

previous sections of the single file. Thus, there may be separate subfolders with headings such as the following:

- Research (briefs of most pertinent cases, annotations, etc.)
- Voire Dire (collections of standardized questions and any special questions because of certain facts of case)
- Opening Statement (summaries of investigation or medical files, list of key points to cover, etc.)
- Closing Argument (list of key points, special notes taken during trial, etc.)
- Witnesses (names, summary of questions, excerpts from examination before trial, hypothetical questions for experts, etc.)
- Instructions (proposed instructions collected before and during trial)
- Miscellaneous (background notes concerning facts and events of case, interview notes, other memoranda)²⁹

§ 53. Trial notebook

A trial notebook is one system many attorneys use to organize their cases for trial. The notebook is usually a three-ring binder or several binders containing copies of the documents counsel is most likely to use during trial: pleadings, orders, rules, motion papers, cases and other legal authorities, trial brief or outline, order of proof, notes for opening statement and closing argument, matters concerning discovery, jury instructions or proposed findings, testimony outlines, and exhibits. The notebook is also the place to keep anything else counsel might need during trial, such as telephone numbers and addresses of witnesses on call, juror charts and biographical information, extra note paper, or notes about issues to raise during the trial. There are a number of commercially available trial notebook systems, usually containing subject dividers and other materials to assist in trial preparation.³⁰

■■■■ Observation: In complex cases, the trial notebook may serve solely as an evidence management tool containing notes on opening and closing statements, witnesses, and exhibits, with other pertinent materials stored elsewhere. Some attorneys who use the notebook for this limited purpose maintain a separate section for each plaintiff and defense witness, appending relevant deposition summaries, interrogatory references, affidavits and the like. Other pertinent materials can be brought into court in a large, filedrawer-sized box, subdivided and organized for easy accessibility.³¹ It has been said to be misleading, however, to think that one trial notebook will suffice at trial, and it has been suggested that counsel have separate notebooks (the number depending on the complexity of the case) for plaintiff's liability witnesses, plaintiff's damage witnesses, defendant's liability witnesses (which should include a copy of each witness's deposition, questions for cross-examining that witness, and exhibits to be used during

29. **Practice References:** 1 Am Jur Trials 189, Processing the Case §§ 68-73.

30. **Practice References:** Charfoos and Christensen, *Personal Injury Practice* (1986) § 16.5; Carlson, *Successful Techniques for Civil Trial* (1983) § 8:19; Danner and Toothman, *Trial Practice Checklists* (1989) § 7:80(B); Purver, Young, Davis, and Kerper, *The Trial Law-*

yer's Book: Preparing and Winning Cases (1990) Ch 8; Schweitzer, *Cyclopedia of Trial Practice* 2d ed, Vol 1 (1970) §§ 124-129; Branson and Branson, *Innovative Trial Techniques*, Trial, Feb. 1989, p 63.

31. **Practice References:** Charfoos and Christensen, *Personal Injury Practice* (1986) § 16.5.

the cross-examination), medical literature, pleadings, and any other topics the evidence may justify.³²

■■■■ **Caution:** The notebook is a form of confidential work product, prepared only for counsel's use. Counsel should therefore be careful not to share the notebook with a witness or expert, which may cause it to become discoverable.³³

In a complex criminal case, the trial notebook is perhaps the most important tool for defense counsel. Its contents may include the indictment, the cast of characters connected with the case (including outline of potential testimony at trial), a chronology of important events in summary form, grand jury testimony, pretrial investigative reports, and evidence (lab reports, exhibits, transcripts of wiretaps, etc.).³⁴

§ 54. Pretrial memorandum

A pretrial memorandum sets forth basic information in a tersely written document which includes a concise recital of facts, positions of the parties, issues of law and fact, names and number of witnesses and exhibits, as well as other relevant data. A plaintiff's memorandum involving a single defendant might cover the following: (1) Trial counsel for each party; (2) Jury (or nonjury) trial; (3) Jurisdictional questions and background and history of pending case; (4) Plaintiff's position; (5) Established facts; (6) Contested issues of fact; (7) Issues of law; (8) Requested amendments to pleadings; (9) Pending motions; (10) Contemplated motions; (11) Additional matters; (12) Probable length of trial; (13) Witness list; (14) List of exhibits. A pretrial memorandum in a case involving multiple defendants would additionally show plaintiff's contentions with regard to each defendant and the contested issues of fact as to each defendant.³⁵

§ 55. Docket of pending cases and calendar of deadlines

Once an attorney or firm accumulates a number of clients and cases, proceeding on different schedules and with different priorities, and following different procedural rules, the deadlines must all be met and each case given the appropriate attention. Malpractice insurers often insist on a record system designed to reduce the risk of missing deadlines. And smooth office practice and optimal case preparation are possible only if all steps are well planned and the work is not all done in a hurry on the eve of each deadline.³⁶

■■■■ *Checklist for maintaining a docket and calendar*

- As each matter enters the firm, add it to the docket of pending cases and add all known deadlines to the calendar. Include statute of limitations and administrative remedy deadlines.
- There is no single way to keep track of deadlines. There are commercially available systems, including some making use of computers. Counsel may wish to have several intermediate reminders before an important deadline.

32. Practice References: Rogers, *Revising Outdated Trial Tactics*, Trial July 1989, p 72.

33. Practice References: Danner and Toothman, *Trial Practice Checklists* (1989) § 7:80(B).

34. Practice References: Bailey and Rothblatt, *Investigation and Preparation of Criminal*

Cases 2d ed (1985) §§ 12:9 et seq.

35. Practice References: Swartz and Swartz, *Handbook of Personal Injury Forms and Litigation* (1982) §§ 5:4-5:6.

36. Practice References: Danner and Toothman, *Trial Practice Checklists* (1989) § 1:40.

- Review local rules, court orders, rules of civil procedure, and statutes for deadlines established by each.
- As a pleading, discovery request, motion, or other document is received, enter the deadline for responding on the calendar. If multiple counsel are involved in the case, make sure it is clear who has responsibility for meeting the deadline.
- Besides procedurally imposed deadlines, counsel may wish to enter personally imposed deadlines (such as factual investigation, filing motions, preparing and serving discovery, scheduling the trial, subpoenaing and preparing witnesses, and completing trial preparation.
- Even after the trial, maintain deadlines for such matters as post-trial motions, filing a petition for attorney fees and costs, enforcing a judgment, and filing an appeal notice.
- Counsel must not undermine this system by intercepting mail or failing to tell the docket keeper about deadlines known only to counsel.³⁷

§ 56. Other trial aids

There are scores of possible trial aids, since anything that may help counsel at trial can be used, as long as the judge does not sustain an objection. Counsel who is not sure the aid will be appropriate in court should consult with other attorneys familiar with the court, opposing counsel, the court clerk or bailiff, or the judge for permission. To avoid disrupting the courtroom, counsel should insure that the aid is prepared or set up during recess. Among the many possible aids are:

- Overhead or opaque projectors
- Slide or movie projectors
- Tape recordings
- Videotape playbacks³⁸
- Blowups and large diagrams
- Large paper pads and chalkboards
- Courtroom demonstrations
- Models
- Computers in court³⁹

|||| Caution: Do not assume that all courtrooms have easels, blackboards, overhead projectors, and other visual aids. The attorney should check what equipment is available in the courtroom where the case will be tried.⁴⁰

§ 57. Computerized litigation support systems

Litigation support is a means of compiling, organizing, and accessing documents for use in preparation for litigation. Documents (or abstracts thereof) are stored, coded, and indexed in a computer to be called up by the attorney as needed. The advantages of computerized litigation support range

37. Practice References: Danner and Toothman, Trial Practice Checklists (1989) § 1:40.

38. Practice References: 23 Am Jur Trials 95, Use of Videotape in Civil Trial Preparation and Discovery.

39. Practice References: Danner and Toothman, Trial Practice Checklists (1989) § 7:80(C).

40. Practice References: Rogers, Revising Outdated Trial Tactics, Trial, July 1989, p 72.

from the very simple—eliminating the need to maintain rooms of document-filled boxes—to the highly complex—providing immediate access to specific documents and permitting entry of complex search requests. In-house systems can generally handle case involving under 5,000 documents; between 5,000 and 10,000 documents can be handled internally with computer software; more than 10,000 documents might require contracting outside assistance from a full-service litigation support firm.⁴¹ Litigation support can also be a way for small firms to take on complex cases they wouldn't dare touch otherwise for fear of being buried in paper.⁴²

Some commentators have identified three types of computer-assisted litigation support:

- Legal research
- Resource management, and
- Litigation information management.

Legal research involves the use of commercial databases as well as databases to handle past research work done in-house. Resource management encompasses everything done administratively to keep the lawfirm running. Litigation information management is closer to what the attorney might expect of something labeled "litigation support." It is simply a specialized variety of database management. Litigation information management has the special objective of storing and retrieving any fact or combination of facts relating to a particular litigation. These facts include such things as catalogs of physical and documentary evidence, witness statements, summaries of deposition transcripts, answers to interrogatories, and a calendar of procedural events associated with the case. The type of data contained in the database depends upon the needs of the attorney and the capabilities of the system used to manage the data.⁴³

Computerized case-management systems keep the lawfirm organized.⁴⁴ Litigation support systems can be particularly helpful in managing a class action or an action involving numerous plaintiffs such as one arising out of an air crash. It is mandatory to locate and record not only client names but an inventory of minute details, such as addresses, telephone numbers, the varying injuries suffered, whether the class member is alive or, if dead, information about the surrogate. All of this information can be used to sort class members under a variety of categories, organize evidence according to subclasses within the class and create mailing labels to correspond with any such classes or subclasses. Many litigation support systems include calendaring or docket packages that let the attorney know when important court dates are arriving in a given case. Some allow storage of information about the presiding judge, expert witnesses, and a catalog of physical evidence.⁴⁵

■■■■ **Observation:** One commentator has suggested that clients will soon be making decisions and forging relations with law firms based on the

41. Practice References: Litigation Support: Technology and Service to Keep You Ahead, Lawyers Alert, Feb. 5, 1990, pp 9 et seq. (includes profiles of some leading litigation support services).

42. Practice References: How to Use Litigation Support in a Small Firm, Lawyers Alert, July 9, 1990, pp 23, 24.

43. Practice References: Charfoos and Christensen, Personal Injury Practice (1986) § 3.8.

44. Practice References: National Law Journal, Feb. 19, 1990, pp 15, 17, 23.

45. Practice References: Charfoos and Christensen, Personal Injury Practice (1986) § 3.8.

firm's ability to participate in the electronic management of the client's information during complex litigation.⁴⁶

Recommendation: In exploring the feasibility of outside legal support services, the attorney should draft a written formal request for proposal so that the attorney's management needs are clear to the vendor. The uninitiated may begin by informal discussion with vendor representatives to determine what service options are available. If the attorney feels this is beyond his or her ken, a consultant may be of assistance. After the attorney determines what capabilities the service offers, he or she should explore the reputations and track records of several services by talking to other users. The attorney should determine the amount of experience the service has had with litigation support, the size and depth of staff (the attorney should meet staff members with whom he or she will be working), the services' corporate resources and commitment and the cost effectiveness of each individual service. Finally, the lawfirm that will eventually computerize should determine whether the system chosen for outside litigation support is compatible with or adaptable to the system considered for in-house installation and whether the service will assist in recording or downloading existing data from its system to the attorney's in-house system.⁴⁷

An outside service for litigation support offers many advantages to the large and small firm alike. The service generally has large pools of experienced personnel available to code and input data relating to each document. The software it uses is sufficiently sophisticated to handle the task and, in many cases, can be modified further to meet specific legal needs. To prevent unauthorized access to data, most services impose security measures requiring that anyone seeking access to the system first type in a password. Most services use large computers with virtually unlimited storage capacity, a resource even some larger firms cannot afford. For the small firm, a service is an alternative to what may be a prohibitively expensive capital investment. It is also the answer for any size firm that desires computer support for one complex case. On the other hand, the service itself can be expensive, to some firms prohibitively so. While staff is usually experienced, many service bureaus have significant turnover rates that affect the quality of the service. Quality control of input and output may become a concern that is difficult to address without direct access to the system which is often lacking in service bureau arrangements. On this issue, in-house litigation support is preferable. Not only would the attorney have direct control over work product quality, he or she can assure that knowledge on substantive legal issues affecting litigation management is what it should be. Nonetheless, an in-house support system may not be feasible because of the limited capacity of the in-house system or because inconsistent need for litigation support makes adequate staffing difficult.⁴⁸

Nevertheless, the techno-lawfirm may conclude that the greater degree of quality control outweighs potentially greater costs, and that the litigation

46. Practice References: Buckosky, Automated Litigation Support: New Programs Handle Large Volume. *The National Law Journal*, March 5, 1990, pp 29, 32, 39.

Christensen, *Personal Injury Practice* (1986) § 3.8.

48. Practice References: Charfoos and Christensen, *Personal Injury Practice* (1986) § 3.8.

47. Practice References: Charfoos and

information management function should be established in-house. This is a major undertaking which should be attempted cautiously. The lawfirm must first determine its requirements and then acquire the system that will best meet them. Because the system will be reused, the lawfirm must not base its decision on the one existing case that will initially make use of the system. Any in-house litigation support system should have sufficient capacity to store the lawfirm's anticipated document load. It should be operated according to procedures which are sufficiently uniform to guarantee consistency and yet flexible enough to accommodate different types of cases. Personnel must be trained to screen, code, and input documents according to these procedures. Or, input could be achieved by contracting with an outside vendor to load data onto a disk which is returned to the firm for use on its own computer. Most importantly, the system should be designed to allow the attorney as well as computer operators to retrieve information simply and quickly.⁴⁹

Litigation support "systems" may include an actual physical space—a center designed to not only support the documentation needs of any litigation, but also to contain case rooms or "war rooms," conference rooms, offices, a moot courtroom, and other training facilities for instruction of young lawyers in necessary advocacy skills. In addition to computerized workstations, the center may have a small reference library, a copy center, fax machines, and the like. The center for a large firm may be run by a full-time coordinator assisted by a support staff.⁵⁰

§ 58. Litigation groups

A litigation group is a forum in which lawyers with similar cases can exchange information, experiences, and strategy. The first groups were organized by attorneys handling products liability cases involving a common product, but today there are groups for lawyers suing other types of defendants, and such groups are continuing to grow and expand. Dues are often required.⁵¹

§ 59. Checklist for trial countdown

The following checklist commences approximately 100 days before trial. The purpose of this checklist is not to focus upon, for example, settlement or the discovery process, but rather to establish a series of guidelines by which a litigator can compare the steps taken to prepare his or her case to those needed to ensure that preparation is complete and the case is postured for victory. Although certainly no one can guarantee a successful verdict, the one thing that can be guaranteed is that a less-than-successful verdict will not be attributable to less-than-successful preparation.

100 Days Before Trial

- Complete discovery. Review all depositions, interrogatories, requests for admissions and document production requests.
- Organize expert depositions. Unless you have already done so, identify and notice the depositions of all expert witnesses being offered by your opponent.

49. *Practice References:* Charfoos and Christensen, *Personal Injury Practice* (1986) § 3.8.

50. *Practice References:* *National Law Journal*, Sept. 3, 1990, pp 15, 17.

51. *Practice References:* *Litigation Groups for Plaintiffs' Lawyers Continue to Expand*, *Lawyers Alert*, Sept. 18, 1989, pp 17, 18 (includes a listing of current litigation groups under the aegis of the Association of Trial Lawyers of America).

- File a set of “cleanup” interrogatories that include inquiry into the names of all witnesses, the subject matter of the testimony of all witnesses, the names of expert witnesses, the subject matter and opinions of the expert witnesses, any factual basis for the denial of assertions of negligence or for the allegation of affirmative defenses, inquiry into any demonstrative evidence that will be used at trial and that may not have been disclosed previously including such things as charts, graphs, diagrams, experiments, demonstrations, recreations, videotapes, computer-generated evidence, motion picture films and photographs.
 - Draft and file a motion in limine to preclude certain issues from the case, define the nature of other issues or obtain preliminary rulings on certain evidence.
- Complete investigation.
 - Finish up all interviews with non-expert witnesses, including eyewitnesses.
 - Double check that any wreckage or product type exhibits will be available.
 - Double check that any witnesses being requested from governmental agencies will, to the extent allowed by the agency, be available for trial.
 - Make a list of all witnesses for whom subpoenas must be issued. A list should also be made of all documents and other materials for which subpoenas must be issued.
 - Be sure you know who the document custodian is with respect to the production of any documents at trial.

60 to 45 Days Before Trial

- Focus on settlement.
 - If it has not already been set, consider whether a final pretrial conference should be requested. You may find that such is, in any event, ordered by the judge.
 - Determine the latest position on settlement and to the extent it is deemed appropriate, a settlement offer or demand should be made.
- Prepare for pretrial conference and order.
 - Along with your opponent you should prepare the pretrial order.
 - After the pretrial conference, a pretrial order can be finalized based upon whatever rulings the judge may have made, and it can then be entered.

45 to 30 Days Before Trial

- Prepare file. All files should be reviewed to determine whether they have been organized in a way that facilitates maximum access of information.
- Outline all elements of proof. All allegations you must prove to support your position should be listed in detail.
- Prepare depositions for trial. Determine which portions of the deposition will be offered and the manner in which they will be offered. Will they be submitted in an underlined form? Will you have narrative deposition summaries? Have videotape depositions been edited and prepared for use in the courtroom?
- Prepare the client.
 - Meet with and brief your client on the more general aspects of being a witness.
 - Provide the client with a copy of any interrogatory answers prepared by him or her, as well as with any deposition the client has given.

- Update medical examination. Have a current medical examination of your client (or the plaintiff) in a personal injury case.
- Prepare non-expert witnesses.
 - All non-expert witnesses should be contacted and interviewed by telephone or in person depending upon the particular witness.
 - Organize all exhibits and statements that are going to be used with a particular witness.
 - Advise non-expert, non-party witnesses of scheduling and seek to clear any conflicts.

30 Days Before Trial

- Have all relevant government records, including weather records, certified.
- Make sure that sufficient copies of all documents and other records are available.
- Ensure that foundation is available for all records and other documents.
- Review all records to determine what material, if any, may require the preparation of motions in limine—particularly relative to items of evidence that you may want to keep out of the records.
- Review the investigative report of any government agency to determine what segments of the report are admissible, i.e., hearsay problems, statutory bars.
- Highlight exhibits to flag key portions of them, to ensure that the information is readily available to you during the examination of witnesses.
- File your exhibits in your case-organization system in a manner that is case specific.
- Get stipulations from opposing counsel relative to as many of your exhibits as possible.
- Prepare short evidentiary briefs on exhibits you expect will be an issue. Review all demonstrative evidence for foundation requirements.
- Consider indexing medical records and tabbing them in several categories to permit ready access.

15 Days Before Trial

- Consider the trial objections that may be made and, whether an in limine motion is appropriate.
- Draft your trial brief.
 - Focus upon various issues you believe will come up during the trial and are susceptible to resolution prior to the trial by motion in limine.
- Consider filing a motion for summary judgment as to certain matters susceptible to resolution before commencement of trial.
- Draft jury instructions. Do your initial draft of jury instructions when you are outlining the elements of proof to ensure that you introduce all required elements supporting a particular jury instruction. At this stage, you should finalize those jury instruction.
 - File your instructions with the judge before the trial begins even if the judge doesn't require such a filing.
- Think about the kind of jury you would like to have decide your case.
- Draft your voir dire questions.
- Prepare subpoenas for all witnesses. Be sure that the subpoenas are

issued in sufficient time to allow their being served. Make sure checks are included covering witness' fees.

5 Days Before Trial

- Learn everything you possibly can about the judge. Consider running a Lexis or Westlaw search of the judge's prior decisions to determine whether he or she has ruled on any similar matters, motions or related areas on prior occasions.
- To the extent you have not already done so, find out as much as you possibly can about your opponent. Check Martindale-Hubbell to see if he or she is listed. Chat with colleagues to determine whether they have had any experience with your opponent.
- Review your entire case file at least once.
- Revisit your settlement position and be prepared to take a final settlement position at the trial.
- Although you already may have established your order of proof, review it one final time to see if it is the most logical and persuasive order that can be achieved.

1 Day Before Trial

- Double check that all professional and personal obligations have been accounted for or otherwise resolved.
- If you are trying a case out of town, make sure all your hotel reservations and those of witnesses have been confirmed.
- Think about your clothing for the trial so you don't have to think about it on a day-to-day basis. This is particularly important if you are out of town.

This checklist will provide trial counsel with a working outline of matters to be considered before commencing a trial. It is not meant to be all inclusive; rather, it is structured in such a way so as to permit an attorney to add elements and time frames as appropriate.

The well-organized trial lawyer starts off with an advantage that his or her opponent may never be able to overcome. The key to successful preparation is to ensure that none of the details are overlooked. Using this checklist as adapted to a particular case can help provide the added assurance of knowing that all details have been accounted for before trial.⁵²

III. PRELIMINARY PROCEEDINGS [§§ 60-179]

A. SETTING THE CASE FOR TRIAL; DOCKETS AND CALENDARS [§§ 60-90]

Research References

FRCP 40; FRCP 79

FRCrP 50

Unif R Crim P Rule 721

ALR Digest to 3d, 4th, and Federal, Criminal Law § 105.5; Trial §§ 1.3-1.9

Index to Annotations, Docket and Calendar of Court; Preliminary or Pretrial Matters
 9 Am Jur Pl & Pr Forms (Rev), Equity, Forms 51-54; 11A Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Form 1471; 18 Am Jur Pl & Pr Forms (Rev), Motions, Rules and Orders, Form 14; 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 1-27

52. Dombroff, Checklist for Trial Countdown, *The National Law Journal*, March 13, 1989, pp 15, 17. Reprinted with the permission of *The*

National Law Journal. Copyright, 1990, The New York Law Publishing Company.

3 Am Jur Trials 681, Tactics and Strategy of Pleading § 57 (Obtaining preference on trial calendar)

33 Federal Procedure L Ed, Trial §§ 77:20 et seq.

1. IN GENERAL [§§ 60–64]

§ 60. General requisites

■■■■ *Definition:* Setting a case for trial means to enter an order fixing a certain day upon or after which the case may be called for final disposition or trial,⁵³ thus placing the case on the trial calendar.⁵⁴

Before there can be a trial of a case in the sense of that term as used in this article, the case must have been brought to issue by the pleadings.⁵⁵ In other words, the case cannot proceed to a trial on the merits until the pleadings are closed,⁵⁶ and issue is joined.⁵⁷ Under some state procedural rules, an action is at issue after any motions directed to the last pleading served have been disposed of, or, if no such motions are served, a specified number of days after service of the last pleading,⁵⁸ and the existence of cross-claims among the parties will not prevent the court from setting the action for trial on the issues raised by the complaint, answer and any answer to a counterclaim.⁵⁹

■■■■ *Practice guide:* It is not necessary to set a case for trial before it may properly be dismissed for want of prosecution, and the same is true where pleadings are properly struck and a default judgment entered.⁶⁰

■■■■ *Observation:* The trial judge cannot force a party to trial before the issues have been made up, especially where the aggrieved party has not been given proper notice of the court's proposed action.⁶¹

§ 61. Notice of readiness, note of issue, etc., generally

Both the procedure for setting a case for trial and the terminology employed to describe it vary considerably among the jurisdictions. Thus, in some states a notice that the action is at issue and ready to be set for trial may be

53. *Moore v Sargent*, 112 Ind 484, 14 NE 466.

As to setting cause for hearing in equity, see 27 Am Jur 2d, Equity § 235.

Forms: Setting case for trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 1 et seq.

54. §§ 76 et seq.

55. *Hamblin v Superior Court of Los Angeles County*, 195 Cal 364, 233 P 337, 43 ALR 1509; *Ellis v Ellis* (Fla App D4) 242 So 2d 745; *State v Poynter*, 34 Idaho 504, 205 P 561; *Continental Illinois Nat. Bank & Trust Co. v Eastern Illinois Water Co.* (5th Dist) 31 Ill App 3d 148, 334 NE2d 96.

The only cases that may be placed on the trial list are (1) cases in which the pleadings have terminated in an issue of fact, and (2) hearings in damages on default. *Wooding v Zasciurinskas*, 14 Conn App 164, 540 A2d 93.

56. *Evans v Santoro*, 6 Conn App 707, 507 A2d 1007; *Reddick v Puntureri*, 242 Pa Super 138, 363 A2d 1198.

57. *Lakeland Water Dist. v Onondaga County Water Authority*, 24 NY2d 400, 301 NYS2d 1, 248 NE2d 855.

58. See, for example, the provisions set out and discussed in *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587; *Davidson v Gregory* (Okla) 780 P2d 679.

59. *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587.

60. *Sunbelt Tectonics, Inc. v Ramirez* (Tex App San Antonio) 742 SW2d 771.

61. *Housing Authority of Williamson County v Collier* (5th Dist) 13 Ill App 3d (abstract) 1088, 302 NE2d 365.

filed and served by any party.⁶² Under other practice statutes or rules a note of issue and a statement or certificate of readiness are filed or served,⁶³ while at least one state's practice calls for an "at-issue memorandum."⁶⁴ And in a few states the procedure calls for a motion to set the cause for trial,⁶⁵ or a request to the clerk of the court to place the cause on the trial calendar.⁶⁶

§ 62. Contents of notice

Some procedural rules specify the contents of a notice of readiness for trial or its equivalent. Thus, for example, it may be required that the notice include an estimate of the time required,⁶⁷ whether the trial is to be by a jury or not, and whether the trial is on the original action or a subsequent proceeding.⁶⁸

§ 63. Sufficiency of filing of note of issue

The mailing of a note of issue does not constitute a filing within the

62. See, for example, Fla RCP Rule 1.440(b) and (c), set out and discussed in *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587 (holding that although defendants served the notice following the alleged disposition of a motion to dismiss directed to the last pleading, no answer had yet been filed crystallizing the issue, thus making the notice premature because the action was not at issue as contemplated by the Rule).

Forms: Notice of readiness for trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 2, 3.

63. *Hyman & Gilbert, P.C. v Greenstein* (2d Dept) 138 App Div 2d 678, 526 NYS2d 492; *Beitelspacher v Winther* (SD) 447 NW2d 347, later app (SD) 466 NW2d 638 (noting that the requirement of serving a certificate of readiness for trial may be dispensed with by the trial judge, but the statute is permissive and he need not do so, and holding that in the circumstances of the case, the trial court's decision on the issue was not an abuse of discretion).

A court possesses authority to permit belated discovery after the note of issue and statement of readiness have been served, if the demands of justice dictate nonenforcement of the rule. *Maxie v Gimbel Bros., Inc.*, 102 Misc 2d 296, 423 NYS2d 802.

Caution: In a proceeding to review real property tax assessments for certain tax years, the petitioner may be required by local law or rules to file a separate note of issue for each tax year in issue. *Waldbaum, Inc. v Finance Admr.*, 132 Misc 2d 364, 504 NYS2d 347, later proceeding (2d Dept) 141 App Div 2d 10, 532 NYS2d 539, revd, cufd ques ans 74 NY2d 128, 544 NYS2d 561, 542 NE2d 1078.

Forms: Note of issue. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 1.

64. See, for example, *Bach v County of Butte* (3rd Dist) 215 Cal App 3d 294, 263 Cal Rptr 565. The court pointed out, however, that

filing an at-issue memorandum is not required to invoke the jurisdiction of the court. The rules of court require litigants to file an at-issue memorandum in order to place the case on the civil active list before setting it for trial. This filing is required as part of the court's internal procedures to manage the scheduling of civil trials and is not a prerequisite to jurisdiction.

Forms: Memorandum and request—To set cause for trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 6.

65. Forms: Notice of motion to set cause for trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 7.

—Motion to set cause for trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 8.

—Federal practice—Motion and notice to have cause assigned for trial. 11A Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Form 1471.

66. Forms: Notice—Of request to clerk—To set cause for trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 4.

—Request—To clerk of court—To place cause on trial calendar. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 5.

67. Counsel has a duty to make an accurate estimate, as nearly as possible, of the time which is required to try a case in order to assist the court in managing its dockets. *Re Marriage of Goellner* (Colo App) 770 P2d 1387 (holding that the record demonstrated that counsel did not make a proper estimate of the time that would be needed for the court to hear the case).

68. See, for example, Fla RCP Rule 1.440(b), set out and discussed in *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587.

Forms: Memorandum and request—To set cause for trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 6.

meaning of a practice provision specifically requiring a party upon whom a demand is made to “serve and file a note of issue” within a specified number of days.⁶⁹ Plaintiff’s filing of a note of issue was untimely under the terms of a stipulation of the parties allowing for an extension of plaintiff’s time to file the note of issue for 30 days from any appeal from plaintiff’s motion to reargue dismissal of the complaint where, although the note of issue was mailed to the county clerk’s office within the 30-day period, it was returned for lack of fee and therefore was not actually “filed” until a later date when the fee was paid and the clerk had the note in hand.⁷⁰

§ 64. Sanctions for failing to file timely notice

■■■■ *Caution:* In at least one state (California), local “Fast Track” rules of practice (enacted to implement the state Trial Court Delay Reduction Act) authorize the court to impose monetary sanctions against an attorney for failing to timely file the required joint at-issue memorandum or a certificate as to why one was not filed in the case. The constitutionality of such local rules has been upheld.⁷¹

2. ORDER SETTING CASE FOR TRIAL; NOTICE OF TRIAL [§§ 65–75]

§ 65. Generally

After a party has filed and served a notice of readiness for trial, or an equivalent thereof (depending on the local practice), the clerk of the court submits the notice and the case file to the court, and if the court finds the action ready to be set for trial, it is required to enter an order fixing a date for trial.⁷² A notice of trial is then sent to each party or their attorney.⁷³ The purpose of a trial notice is to insure that a party or his counsel receives at least a specified number of days’ notice prior to trial of the date on which the trial is to be held so that he can prepare therefor and eliminate surprises.⁷⁴

■■■■ *Observation:* It has been noted, in a case decided under a rule stating that after the filing of a notice of readiness for trial the court shall enter an order fixing a date for trial if it finds the action ready to be set for trial, that the rule does not provide an exception for local practice to permit reliance on the notice and dispense with the order, although a court took judicial notice that it was in fact the custom and practice in many jurisdictions to dispense with the order, and while such practice was criticized, the court concluded that a fairly wide latitude must be accorded

69. *Juracka v Ferrara* (3d Dept) 137 App Div 2d 921, 524 NYS2d 885, app dismd without op 72 NY2d 840, 530 NYS2d 555, 526 NE2d 47, app den 74 NY2d 642, 541 NYS2d 982, 539 NE2d 1110.

70. *Billings v Berkshire Mut. Ins. Co.* (3d Dept) 149 App Div 2d 895, 540 NYS2d 577.

71. *Laborers’ Internat. Union etc. v El Dorado Landscape Co.* (4th Dist) 208 Cal App 3d 993, 256 Cal Rptr 632, review den.

72. See, for example, Fla RCP Rule 1.440(b) and (c), set out and discussed in *Bennett v*

Continental Chemicals, Inc. (Fla App D1) 492 So 2d 724, 11 FLW 1587.

The duty to set the case for trial rests solely with the court. *Yankee Constr. Corp. v Jones-Mahoney Corp.* (Fla App D2) 430 So 2d 973.

Forms: Objection—To setting of trial date. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 16.

—Order—Setting cause for trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 17, 18.

73. **Forms:** Notice of trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 20-23.

74. *Richards v Richards* (La App 3d Cir) 525 So 2d 163.

to the local courts in the handling of such matters.⁷⁵ But in a subsequent case, the court, receding from such position, held that, in the interest of promoting uniformity and upholding the requirements of due process, strict compliance with the rule is mandatory.⁷⁶

Practice guide: After the trial court enters an order setting the cause for trial, if any party continues the case, the litigants have an obligation to renote the case for trial or at least initiate some action to alert the court that the case needs to be reset.⁷⁷

§ 66. Necessity of notice

Although it is stated broadly by some courts that, in the absence of a statute or rule, it is not necessary to give a party litigant notice,⁷⁸ because it is up to the litigant to keep himself apprised of the time the case is set for trial,⁷⁹ it is clear that some form of notice is an essential element of procedural due process.⁸⁰ A trial or hearing must be prefaced by timely notice which adequately informs the parties of the specific issues they must be prepared to meet.⁸¹ When notice is required by statute or rule, defendants who have entered a general appearance are entitled to be notified, in person or through their counsel, of any hearing where evidence will be taken on the merits of the case.⁸² A party not in default is entitled to notice of a trial setting.⁸³

75. *Padgett v First Federal Sav. & Loan Asso.* (Fla App D1) 378 So 2d 58 (diverged from by *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587).

76. *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587, followed in *Lauxmont Farms, Inc. v Flavin* (Fla App D5) 514 So 2d 1133, 12 FLW 2529 (disagreed with on other grounds by *Sloan v Freedom Sav. & Loan Asso.* (Fla App D5) 525 So 2d 1000, 13 FLW 1272).

77. *Fishe & Kleeman, Inc. v Aquarius Condominium Asso.* (Fla App D4) 503 So 2d 1272, 12 FLW 342, approved (Fla) 524 So 2d 1012, 13 FLW 301.

Due process requires that a party be given notice, by order of the court, setting a cause for trial where the case is reset to another trial period after a continuance. *Taieb v Pierre-Levy* (Fla App D3) 505 So 2d 624, 12 FLW 1021.

78. *Ritter v State* (Ala App) 494 So 2d 76; *Rubbelke v Aebli* (Mo) 340 SW2d 747 (diverged from by Division of Employment Secur. v Smith (Mo) 615 SW2d 66) as stated in *Eastin v Franklin* (Mo App) 1991 Mo App LEXIS 207; *Burnett v Hatch*, 200 Or 291, 266 P2d 414; *Rim Group v Mountain Mesa Uranium Corp.*, 78 Wyo 204, 321 P2d 229, reh den 78 Wyo 213, 323 P2d 939.

79. *Bowman v Slade* (Ala App) 501 So 2d 1236; *Smith v Smith* (5th Dist) 170 Ill App 3d 681, 121 Ill Dec 331, 525 NE2d 137; *Ries Flooring Co. v Dilenno Constr. Co.* (Cuyahoga

Co) 53 Ohio App 2d 255, 7 Ohio Ops 3d 320, 373 NE2d 1266, motion overr.

It is well-settled law that litigants, once in court, must keep track of their case, know its status and ascertain for themselves when their case will be tried. *Robinson v Walker Builders, Inc.* (Ala App) 491 So 2d 966; *Bowman v Pat's Auto Parts* (Ala App) 504 So 2d 736.

80. *Coleman E. Adler & Sons, Inc. v Waggoner* (La App 5th Cir) 538 So 2d 1131; *Oscar Daste & Sons, Inc. v Dobard* (La App 4th Cir) 516 So 2d 1331, later proceeding (La) 522 So 2d 576 and cert den 488 US 828, 102 L Ed 2d 57, 109 S Ct 81, reh den 489 US 1072, 103 L Ed 2d 826, 109 S Ct 1359; *Ohio Valley Radiology Associates, Inc. v Ohio Valley Hospital Asso.*, 28 Ohio St 3d 118, 28 Ohio BR 216, 502 NE2d 599 (holding that nothing in the record indicated that plaintiffs had reasonable notice, constructive or otherwise, of the trial date sufficient to satisfy minimal due process).

81. *Davies v Olson* (Utah App) 746 P2d 264, 70 Utah Adv Rep 42.

82. *Hawkins v Aldridge*, 211 Ind 332, 7 NE2d 34, 109 ALR 1205.

83. *Re Marriage of Wheeler* (Mo App) 743 SW2d 605.

Although pleadings normally do not have to be served on a party in default, an order setting a case for trial is an exception to the normal rule. *Bogan v Kreski* (Fla App D1) 546 So 2d 1132, 14 FLW 1724.

§ 67. Request for notice

According to some civil procedure rules, the clerk of the court is required to give written notice of the date of trial whenever a written request therefor is filed in the record or is made by registered mail by a party or counsel of record.⁸⁴ When no written request for notice of date of trial has been filed, the issue becomes whether adequate notice of trial has been given for purposes of procedural due process.⁸⁵

§ 68. Date or time for notice

When calculating the time for notice, the required number of days is counted by including either the first or last terminal day and excluding the other.⁸⁶

Under a rule requiring that trial be set not less than 30 days from the service of the notice, notice mailed only 8 days before the trial was held not to comport with due process,⁸⁷ but 27 days' notice was considered only a technical violation and harmless error unless the opposing party could prove prejudice from such violation.⁸⁸

Where a statute provides that an issue of fact may not be tried in the absence of an adverse party, unless it is shown to the satisfaction of the court that the adverse party had 15 days' notice of the date set for trial, compliance with the statute is mandatory and jurisdictional, and the time limits prescribed therein may not be shortened except by waiver or the consent of the parties.⁸⁹

■■■■ Observation: In some jurisdictions, summary dispossessory actions by landlords are governed by a special rule providing for only 1-day notice of trial, to ensure expedited trial of such cases.⁹⁰

§ 69. Sufficiency of notice

No hard and fast rule for determining what notice of trial is adequate can be made, as any such rule would be arbitrary.⁹¹ While the law requires that adequate notice be given, it does not require that any particular type or kind

⁸⁴. Darnall v John K. Darnall, Inc. (La App 3d Cir) 526 So 2d 1317, cert den (La) 531 So 2d 273.

Forms: Request for written notice of trial date. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 15.

⁸⁵. Darnall v John K. Darnall, Inc. (La App 3d Cir) 526 So 2d 1317, cert den (La) 531 So 2d 273.

Generally as to sufficiency of notice to satisfy due process requirements, see § 69.

⁸⁶. Excelsior v Minneapolis & S.P.S.R. Co., 108 Minn 407, 120 NW 526, later app 108 Minn 409, 122 NW 486.

Generally as to the computation of time, see 74 Am Jur 2d, Time.

Annotations: Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place

a certain number of days before a known future date, 98 ALR2d 1331 § 21[b].

⁸⁷. Heritage Casket & Vault Ind., Inc. v Sunshine Bank (Fla App D1) 428 So 2d 341.

⁸⁸. Abrams v Paul (Fla App D1) 453 So 2d 826 (diverged from by Bennett v Continental Chemicals, Inc. (Fla App D1) 492 So 2d 724, 11 FLW 1587).

⁸⁹. Minkin v Levander (2nd Dist) 186 Cal App 3d 64, 230 Cal Rptr 592 (disagreed with by County of Los Angeles v Superior Court (2nd Dist) 213 Cal App 3d 30, 261 Cal Rptr 281, review den, op withdrawn by order of ct (Cal) 1989 Cal LEXIS 2026).

⁹⁰. Favors v Arnold, 181 Ga App 286, 351 SE2d 641.

⁹¹. Ries Flooring Co. v Dilenno Constr. Co. (Cuyahoga Co) 53 Ohio App 2d 255, 7 Ohio Ops 3d 320, 373 NE2d 1266, motion overr.

of notice be given, so that a written notice is not required; a party's actual knowledge of the trial date is sufficient.⁹²

There is no due process violation where defendant's counsel was properly notified of the trial and the attorney sent this notice to the defendant by registered mail.⁹³ Mailing a notice of trial to defendant's counsel of record is sufficient notice to satisfy the due process requirements, and although plaintiff's counsel knows that another attorney is currently representing defendant, plaintiff's counsel is under no obligation to give notice of the trial date to such other attorney.⁹⁴ Under a civil procedure rule requiring the clerk of a court to notify all out-of-county attorneys of record that a case has been placed on the trial docket, defendant received sufficient notice where his attorney received a copy of the court's order that the case was being rescheduled for trial at the next call of the docket.⁹⁵

■■■■ Observation: The mailing of a photocopy of the court's order to counsel of record is sufficient.⁹⁶

Notice of a trial setting given in one cause is not sufficient notice of setting in a related cause filed and maintained under a separate docket number, where there had been no consolidation of the cases.⁹⁷ Where a party has appeared in an action, and the name and address of the party and his attorney are part of the court record, due process of law is not satisfied by mere publication of a notice of trial in a single issue of a legal newspaper, without entry upon the docket.⁹⁸

In a proceeding challenging a default judgment entered in a suit for unliquidated damages, a certificate on the order setting the cause for trial stating that the order was mailed "to each attorney of record and party appearing without counsel," which constituted proof of mailing pursuant to the rules of procedure, did not constitute proof that the order was mailed to the defendants, where there were no attorneys of record for defendants and where neither of the defendants appeared without counsel, and where it was unclear as to whether the certificate referred to a party named in the suit.⁹⁹

§ 70. Receipt of notice by party

The presumption of receipt of the notice of trial raised by a certificate of service is not conclusive; and a sworn denial of receipt is neither sufficient nor

92. *Darnall v John K. Darnall, Inc.* (La App 3d Cir) 526 So 2d 1317, cert den (La) 531 So 2d 273.

93. *Oscar Daste & Sons, Inc. v Dobard* (La App 4th Cir) 516 So 2d 1331, later proceeding (La) 522 So 2d 576 and cert den 488 US 828, 102 L Ed 2d 57, 109 S Ct 81, reh den 489 US 1072, 103 L Ed 2d 826, 109 S Ct 1359, wherein the court noted that the case had been set for trial numerous times and was continued on all but one occasion by defendant and that defendant was fully aware of the trial date and advised by a hearing commissioner that he should be present on the trial date.

94. *Coleman E. Adler & Sons, Inc. v Waggoner* (La App 5th Cir) 538 So 2d 1131.

95. *Robinson v Walker Builders, Inc.* (Ala

App) 491 So 2d 966.

96. *Ancona v Lathan* (La App 5th Cir) 506 So 2d 222.

97. *Blackmon v Blackmon* (Tex Civ App Houston (1st Dist)) 529 SW2d 574.

98. *Ries Flooring Co. v Dileo Constr. Co.* (Cuyahoga Co) 53 Ohio App 2d 255, 7 Ohio Ops 3d 320, 373 NE2d 1266, motion overr.

99. *Scott v Johnson* (Fla App D3) 386 So 2d 67 (disagreed with on other grounds by *Abrams v Paul* (Fla App D1) 453 So 2d 826 (diverged from by *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587)) (remanding the cause to the trial court to conduct an evidentiary hearing to determine whether its order setting the cause for trial was in fact mailed to the defendants).

insufficient as a matter of law in rebuttal of the presumption.¹ Whether defendant received the notice of trial is a question of fact for the trier of fact.²

Notwithstanding that the defendant in an action was not represented by counsel and may not have realized that a letter requesting a trial setting in a nonjury case was his only notice that the case was actually being set for trial, the letter was sufficient notice of the trial setting where it was received by the defendant more than 1 month before the trial date, since no basis exists for differentiating between litigants represented by counsel and litigants not represented by counsel in determining whether rules of procedure must be followed.³

A joint venture has received notice of the date of trial if the trustee of the venture received such notice.⁴

Under some rules of criminal procedure, when the defendant fails to appear, the trial court may set the case for an in absentia trial, but the court is required to send the defendant notice by certified mail of the trial date.⁵ However, it may not be necessary that the defendant shall have actually received the notice.⁶ And it has been held that even a failure by the court to mail the notice as required was harmless error where defendant had been properly admonished at arraignment that the trial could be held in defendant's absence and defendant's attorney was present at each stage of the proceedings and had knowledge of the trial date.⁷

§ 71. Effect of withdrawal of counsel

Where a litigant is unrepresented by counsel, it has been held that, in order to meet the requirement of procedural due process, when the address of the litigant is known, the unrepresented litigant must receive written notice of trial, either from the court or from his former attorney, at the time the court authorizes his withdrawal as attorney of record. When a trial date is scheduled by the court, and written notice is given to the attorney of record and thereafter the attorney petitions the court for permission to withdraw as the attorney of record, it is the responsibility of the trial court to ensure that the client/litigant receives the notice of the pending trial in writing. The court can satisfy the notice of trial requirement by reissuing the notice of trial to the unrepresented litigant directly, if the address is known, or if unknown, a curator may be appointed to represent the unrepresented defendant or absent defendant, or the court must receive reasonable proof that the withdrawing

1. *Abrams v Paul* (Fla App D1) 453 So 2d 826 (diverged from by *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587).

2. *Abrams v Paul* (Fla App D1) 453 So 2d 826 (diverged from by *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587); *Scott v Johnson* (Fla App D3) 386 So 2d 67 (disagreed with on other grounds by *Abrams v Paul* (Fla App D1) 453 So 2d 826 (diverged from by *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587)).

3. *Mansfield State Bank v Cohn* (Tex) 573 SW2d 181.

4. *Trails East v Mustafa* (Tex App Fort Worth) 713 SW2d 422.

5. *People v Haywood* (3d Dist) 183 Ill App 3d 212, 131 Ill Dec 814, 538 NE2d 1370.

6. *People v Devoe* (3d Dist) 163 Ill App 3d 855, 114 Ill Dec 862, 516 NE2d 1017, app den 119 Ill 2d 562, 119 Ill Dec 390, 522 NE2d 1249, habeas corpus proceeding (ND Ill) 1989 US Dist LEXIS 9784, petition den (ND Ill) 1989 US Dist LEXIS 10876, holding that defendant in a criminal case was properly noticed as to the trial date even though the certified mailing of the notice was returned unclaimed, where the applicable statute merely required that the notice be sent.

7. *People v Haywood* (3d Dist) 183 Ill App 3d 212, 131 Ill Dec 814, 538 NE2d 1370.

attorney has notified the client in writing of the trial date. This can be accomplished by attaching to the motion to withdraw, a certified letter to the client or other evidence indicating the client has received unequivocal written notice of trial. The possibility that the client had oral notice the day prior to trial does not meet the procedural due process requirement.⁸

Where defendants' attorney filed a motion to withdraw as attorney of record, and on the same day the plaintiff's attorney filed a motion to set the case for trial and mailed a copy thereof to the withdrawing attorney, it was held that defendants had proper notice of the trial setting because their attorney knew that the trial date for the case had been set before he was permitted by court order to withdraw as attorney of record, and the order which the defendant's attorney submitted to the court stated that his request to withdraw should be granted subject to his notifying defendants of plaintiff's trial setting by certified mail, which he failed to do.⁹

§ 72. Dispensing with, or waiver of, notice

A notice of trial within a specified number of days is not always necessary, an obvious exception being when both parties are represented and participate in the trial, and there is no claim by a party that it did not have time to prepare for trial.¹⁰ And the requirement of a timely trial notice may be waived.¹¹ Thus, for example, the notice requirement may be waived by all counsel of record at a pretrial conference.¹²

§ 73. Striking notice or note of issue

The usual procedure where a notice that the action is at issue and ready to be set for trial is premature is to move to strike the notice or request the court to remove the action from the calendar.¹³ However, allowing the parties to withdraw their announcement of readiness for trial is within the trial court's discretion.¹⁴ Where plaintiffs filed a motion to set a trial date and certificate of readiness prematurely under the applicable practice rule, but defendants filed no controverting certificate and raised no objection until trial was nearly at hand, the trial court did not abuse its discretion in refusing to strike the motion and certificate.¹⁵ On the other hand, it is an improvident exercise of discretion for the trial court to deny defendant's motion to strike the note of

8. *Century Bank in New Orleans v Doley* (La App 4th Cir) 527 So 2d 437.

9. *Bloom v Bloom* (Tex App San Antonio) 767 SW2d 463, writ den (Jul 12, 1989) and reh'g of writ of error overr (Nov 22, 1989).

10. *County of Los Angeles v Superior Court* (2nd Dist) 213 Cal App 3d 30, 261 Cal Rptr 281, review den, op withdrawn by order of ct (Cal) 1989 Cal LEXIS 2026.

11. *Richards v Richards* (La App 3d Cir) 525 So 2d 163.

12. *Darnall v John K. Darnall, Inc.* (La App 3d Cir) 526 So 2d 1317, cert den (La) 531 So 2d 273.

13. *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587, wherein, however, the court declined to follow

this procedure in order to make clear its position that the rule regarding time of service of the notice was mandatory.

Forms: Notice of motion to vacate note of issue and to strike case from trial calendar. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 24.

—Notice of motion to vacate trial setting. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 25.

—Motion to vacate trial setting. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 26.

—Order vacating original trial date and setting new trial date. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 27.

14. *South Texas Lumber Stores, Inc. v Cain* (Tex Civ App Austin) 416 SW2d 530.

15. *Ace Automotive Products, Inc. v Van Duyne* (App) 156 Ariz 140, 750 P2d 898.

issue where plaintiff prematurely served and filed a note of issue and statement of readiness prior to the expiration of defendant's time to serve an answer.¹⁶

Where a party's death does not affect the merits of a case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution, and therefore there is no need to strike the note of issue.¹⁷

Affidavits submitted in support of defendants' motion to strike the note of issue filed by several plaintiffs are insufficient where they are made by defendants' attorneys rather than by defendants themselves and simply contain conclusory statements as to the status of certain plaintiffs involved in the action without any supporting evidence.¹⁸

§ 74. —Status of disclosure or discovery procedures

Where plaintiff has served and filed a note of issue and statement of readiness although discovery was not complete, defendant may move to strike the note of issue as premature or, in the alternative, for an order compelling plaintiff to submit to further discovery, such as a physical examination, while the action remains on the trial calendar.¹⁹ But, where there has been sufficient time to complete disclosure, the motion to strike can be denied.²⁰

Certificates of readiness, which stated that there were no outstanding discovery requests, did not contain any material misstatements requiring the court to vacate the notes of issue filed, where certain interrogatories were not submitted by the respondents until after the notes of issue were filed.²¹

§ 75. Criminal cases

Statutory provisions regarding the fixing of the date for trial of criminal cases are directory²² rather than mandatory. The fixing of a time for trial rests in the discretion of the trial court, and its action in the matter, including the expediting of trial,²³ will not be disturbed on appeal in the absence of a manifest abuse of discretion, or in the absence of a showing of prejudice.²⁴

A person accused of crime should be allowed a fair and reasonable time in

16. *Hyman & Gilbert, P.C. v Greenstein* (2d Dept) 138 App Div 2d 678, 526 NYS2d 492.

17. *Bova v Vinciguerra* (3d Dept) 139 App Div 2d 797, 526 NYS2d 671.

18. *Bova v Vinciguerra* (3d Dept) 139 App Div 2d 797, 526 NYS2d 671.

19. *D'Amico v Nuzzo* (2d Dept) 122 App Div 2d 246, 505 NYS2d 441, holding that defendants' motion, filed 11 days after plaintiff served and filed the note of issue and statement of readiness, was timely and as such, defendants should not have been required to show extraordinary circumstances to justify conducting a further physical examination of plaintiff.

20. Thus, where 13 months elapsed from the date issue was joined until defendant filed the note of issue as directed by the court, and during that extended period plaintiffs took no steps to further their discovery and failed to

comply with defendant's discovery demands until ordered to do so by conditional order of preclusion, plaintiffs were held to have had adequate time to conduct disclosure and their lack of diligence in pursuing their lawsuit did not constitute a special, unusual, or extraordinary circumstance which would justify striking the note of issue. *Simmons v Kemble* (3d Dept) 150 App Div 2d 986, 541 NYS2d 875.

21. *Long Island Lighting Co. v Assessor of Brookhaven* (2d Dept) 122 App Div 2d 794, 505 NYS2d 679.

22. *State v Kelly*, 27 NM 412, 202 P 524, 21 ALR 156.

23. *State v Kelly*, 27 NM 412, 202 P 524, 21 ALR 156; *Commonwealth v Hare*, 2 Pa D & C2d 726.

24. *State v Kelly*, 27 NM 412, 202 P 524, 21 ALR 156.

which to prepare his defense and produce witnesses.²⁵ But where no prejudice results, the mere fact that a criminal case is set for trial the day after the reindicating of the defendant is not ground for reversal.²⁶ And when a person charged with an offense triable before the court waives indictment and trial by jury, and requests to be tried immediately before the court, it is not necessary for the judge to sign a formal order in writing for the trial of the accused.²⁷

Under some rules of criminal procedure, when the defendant fails to appear, the trial court may set the case for an in absentia trial, but the court is required to send the defendant notice by certified mail of the trial date.²⁸ However, it has been held that even a failure by the court to mail the notice as required was harmless error where defendant had been properly admonished at arraignment that the trial could be held in defendant's absence and defendant's attorney was present at each stage of the proceedings and had knowledge of the trial date.²⁹

■■■■ *Practice guide:* Although the trial court is required to send the defendant notice of the trial date by certified mail,³⁰ under some circumstances it may not be necessary that the defendant shall have actually received the notice.³¹

3. DOCKETS AND CALENDARS [§§ 76-90]

§ 76. Generally

■■■■ *Definitions:* A docket is a list or register of cases for trial, while the calendar is a list of the cases for trial by the term, the week, or even the day, at which a particular case will come on for trial.³²

Both in civil and criminal cases, it is generally recognized that a trial court has inherent power to control its own docket and calendar,³³ to ensure that

25. See 21A Am Jur 2d, Criminal Law § 839.

As to time of trial generally, see § 182.

26. *State v Kelly*, 27 NM 412, 202 P 524, 21 ALR 156.

27. *State v Heyer*, 89 NJL 187, 98 A 413.

28. *People v Velasco* (1st Dist) 184 Ill App 3d 618, 132 Ill Dec 781, 540 NE2d 521, app den (Ill) 136 Ill Dec 603, 545 NE2d 127; *People v Haywood* (3d Dist) 183 Ill App 3d 212, 131 Ill Dec 814, 538 NE2d 1370.

29. *People v Haywood* (3d Dist) 183 Ill App 3d 212, 131 Ill Dec 814, 538 NE2d 1370. To the same effect, see *People v Velasco* (1st Dist) 184 Ill App 3d 618, 132 Ill Dec 781, 540 NE2d 521, app den (Ill) 136 Ill Dec 603, 545 NE2d 127.

30. § 66.

31. *People v Devoe* (3d Dist) 163 Ill App 3d 855, 114 Ill Dec 862, 516 NE2d 1017, app den 119 Ill 2d 562, 119 Ill Dec 390, 522 NE2d 1249, habeas corpus proceeding (ND Ill) 1989 US Dist LEXIS 9784, petition den (ND Ill) 1989 US Dist LEXIS 10876, holding that de-

fendant in a criminal case was properly noticed as to the trial date even though the certified mailing of the notice was returned unclaimed, where the applicable statute merely required that the notice be sent.

32. *Ballentine's Law Dictionary*, 3d ed.

33. *American Life Ins. Co. v Stewart*, 300 US 203, 81 L Ed 605, 57 S Ct 377, 111 ALR 1268; *Landis v North American Co.*, 299 US 248, 81 L Ed 153, 57 S Ct 163; *Government of Virgin Islands v Scatliffe* (DC VI) 580 F Supp 1482, affd without op (CA3 VI) 755 F2d 919; *Al Springer Roofing Co. v Flagler Federal Sav. & Loan Asso.* (Fla App D3) 357 So 2d 478; *People v Stanley* (4th Dist) 116 Ill App 3d 532, 72 Ill Dec 173, 452 NE2d 105; *Sparacello v Andrews* (La App 1st Cir) 501 So 2d 269, cert den (La) 502 So 2d 103; *Goins v State*, 293 Md 97, 442 A2d 550; *State ex rel. Kennedy v District Court of Fifth Judicial Dist.*, 121 Mont 320, 194 P2d 256, 2 ALR2d 1050; *Airmont Homes, Inc. v Ramapo* (2d Dept) 122 App Div 2d 865, 506 NYS2d 74, revd on other grounds 69 NY2d 901, 516 NYS2d 193, 508 NE2d 927; *Rupert v Home Mut. Ins. Co.* (App) 138 Wis 2d 1, 405 NW2d 661.

cases proceed before it in a timely and orderly fashion,³⁴ and such authority cannot be abrogated by the legislature.³⁵ Thus, the matter of placing cases on the docket for trial is largely within the discretion of the trial court, and in the absence of a showing of abuse in such discretion, its ruling will not be disturbed.³⁶ The orderly administration of justice, it has been said, dictates that the trial judge be vested with a considerable amount of discretion with respect to trial calendaring and docket management.³⁷

■■■ Observation: Calendar and docket control and management have been computerized in many court systems throughout the country.³⁸

■■■ Practice guide: The condition of a particular court's calendar, including the problem of congestion, may well be important considerations in selection of the forum for a particular suit,³⁹ or in determining whether to seek a jury or nonjury trial.⁴⁰ Court calendar problems may also be a factor in case evaluation, and should be discussed with the client.⁴¹

As a general rule, unchallenged factual allegations in a docketing statement

Courts have the inherent power, indeed the responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them. *Grisi v Shainswit* (1st Dept) 119 App Div 2d 418, 507 NYS2d 155.

As to notice regarding records, dockets, and reports of judgment, see 46 Am Jur 2d, Judgments § 170.

As to notice of correction of records and dockets, see 46 Am Jur 2d, Judgments § 212.

34. *Government of Virgin Islands v Scatliffe* (DC VI) 580 F Supp 1482, affd without op (CA3 VI) 755 F2d 919.

Balanced against the trial court's obligation to do substantial justice is the need of the trial court, under its inherent power to regulate its calendar, to efficiently manage the cases before it. *Department of Labor & Industrial Services ex rel. Hansen v East Idaho Mills, Inc.* (App) 111 Idaho 137, 721 P2d 736.

35. *People v Stanley* (4th Dist) 116 Ill App 3d 532, 72 Ill Dec 173, 452 NE2d 105 (disapproved by *People v Palmer*, 104 Ill 2d 340, 84 Ill Dec 658, 472 NE2d 795) as stated in *People v Rice* (4th Dist) 137 Ill App 3d 285, 91 Ill Dec 955, 484 NE2d 514 (disagreed with by *People v Hall* (5th Dist) 145 Ill App 3d 873, 99 Ill Dec 644, 495 NE2d 1379 (disagreed with by *People v Smith* (Ill App 2d Dist) 1991 Ill App LEXIS 109, op withdrawn, substituted op (Ill App 2d Dist) 1991 Ill App LEXIS 522)).

A statutory enactment infringing upon the inherent power of the courts in regard to control their dockets might well be constitutionally suspect. *Grisi v Shainswit* (1st Dept) 119 App Div 2d 418, 507 NYS2d 155.

36. *Cowart v State* (Ala App) 488 So 2d 497

(ovrld by *McClendon v State* (Ala App) 513 So 2d 102); *Maximum Technology v Superior Court* (1st Dist) 188 Cal App 3d 935, 233 Cal Rptr 733, review gr, transf (Cal) 242 Cal Rptr 196, 745 P2d 917.

The trial court improperly removed a civil action from the calendar and the civil active list due to the absence from court of plaintiff's attorney, a sole practitioner, at the time the matter was ready for assignment for trial, where the matter had been continued and trailed to that date, creating an unanticipated scheduling conflict with the attorney's scheduled appellate argument, of which the attorney diligently informed the court and over which the attorney had no control, where there were more reasonable alternatives of either sending the matter out for trial pending completion of oral argument or trailing the matter until the attorney was available. *Hernandez v Superior Court* (4th Dist) 169 Cal App 3d 1169, 215 Cal Rptr 755.

37. *Palmer v State* (Miss) 427 So 2d 111.

38. *Court Technology, The National Law Journal*, May 7, 1990, pp 38-42.

39. **Practice References:** Condition of court calendars. 3 Am Jur Trials 611, Selecting the Forum—Defendant's Position § 3.

—Calendar congestion as factor in selection of forum for FELA litigation. 11 Am Jur Trials 397, Litigation Under the Federal Employers' Liability Act § 92.

40. **Practice References:** Calendar considerations. 5 Am Jur Trials 123, Jury or Nonjury Trial—A Defense Viewpoint § 16.

41. **Practice References:** 14 Am Jur Trials 1, Actions for Unfair Competition—Trade Secrets § 24.

of a case that has been assigned to a legal calendar are accepted as the facts of the case.⁴²

§ 77. Criminal cases, in general

In criminal cases, especially, it is said that a trial court must have the power to tightly control its own calendar so that the assignment of cases cannot be manipulated by the defense counsel⁴³ or the prosecutor,⁴⁴ although the prosecutor and the court administrator share the trial court's responsibility for proper management of the calendar.⁴⁵ But a trial court must be very wary that administrative pressures relating to calendar movement do not unduly influence it in the execution of its sound discretion,⁴⁶ and the court's interest in regulating its calendar can never be paramount to a constitutional right of the accused.⁴⁷

■■■■ Observation: A federal court's exercise of its discretion in scheduling trials and granting or denying continuances has been described as "almost standardless," so that assertions of abuse of discretion by the court are largely unsuccessful.⁴⁸

Under the Uniform Rules of Criminal Procedure, the court must provide for the assignment of cases upon the calendar, and may provide by general or special rule for the effective administration of the calendar. The appropriate official must file a written report with the court periodically, as directed by the court, indicating the status of each case not set for trial, including whether the defendant is being held in custody pending trial and, if so, how long he has been in custody.⁴⁹

A change in the trial date may be granted if it is in accordance with the applicable statute and rule and if it is approved by the administrative judge or a judge designated by that judge.⁵⁰

42. *State Farm Mut. Auto. Ins. Co. v Maidment* (App) 107 NM 568, 761 P2d 446 (statement as to death of uninsured motorist involved in collision).

43. *State v Furguson*, 198 NJ Super 395, 487 A2d 730, cert den 101 NJ 266, 501 A2d 933.

Where a plea of not guilty is entered, the court may set the case down for trial at such time as the court determines. *Croft v State*, 180 Ga App 705, 350 SE2d 34 (holding that there was no abuse of discretion in setting the trial on the day following arraignment).

44. Only the trial court, not the state's prosecuting attorney, has authority to schedule criminal cases for trial. *Williams v Commonwealth*, 2 Va App 566, 347 SE2d 146.

The trial court may deny the prosecution's request for adjournment and, if the prosecutor is unable to proceed, place the case on a reserve calendar to be restored only when ready for trial or dismiss the case when the speedy trial period has elapsed. *Holtzman, v Goldman*, 71 NY2d 564, 528 NYS2d 21, 523 NE2d 297.

45. *Commonwealth v Dixon*, 295 Pa Super 345, 441 A2d 1305.

46. *People v Kitt* (1st Dept) 93 App Div 2d 77, 460 NYS2d 799.

47. *Commonwealth v Shirey*, 333 Pa Super 85, 481 A2d 1314, later app 343 Pa Super 189, 494 A2d 420 (disagreed with by Commonwealth v Anderson, 379 Pa Super 589, 550 A2d 807).

The trial court's scheduling decision was held not to have prejudiced defendant or deprived him of a fair trial where the court twice postponed the trial and set a new date with no objection to that date from defense counsel. *State v Ramseur*, 106 NJ 123, 524 A2d 188.

48. *United States v Moya-Gomez* (CA7 Wis) 860 F2d 706 (disagreed with on other grounds by *United States v Bissell* (CA11 Ga) 866 F2d 1343, reh den, en banc (CA11 Ga) 874 F2d 821 and cert den (US) 107 L Ed 2d 166, 110 S Ct 213 and cert den (US) 107 L Ed 2d 104, 110 S Ct 146) and cert den 492 US 908, 106 L Ed 2d 571, 109 S Ct 3221.

49. *Unif R Crim P Rule 721(a)*.

50. *Ingram v State*, 80 Md App 547, 565 A2d 348, cert den 318 Md 2, 566 A2d 754, holding,

■■■■ *Practice guide:* In criminal cases involving press access to criminal proceedings, closure motions should be docketed immediately.⁵¹

§ 78. Federal court practice

The assignment of cases for trial in federal courts is governed by FRCP 40, which directs District Courts to provide by rule for the placing of actions on the trial calendar, and requires that precedence be given to suits entitled thereto by any federal statute. In order to promote economy of time and effort for themselves, for counsel, and for litigants, and to reduce the congestion of court calendars, FRCP 40 gives trial courts wide discretion and authorizes them to promulgate their own rules governing the assignment of cases for trial. As a result of all this power and discretion, it is hazardous to make generalizations about the specifics of calendar practice, and since they may vary from district to district, the local rules should always be consulted to determine the existence of special procedural requirements.⁵²

Most District Court rules provide that the trial judge is responsible for scheduling the date of trial or that a trial calendar shall be prepared by the clerk under the supervision of the trial judge, but it is usually up to the litigants to see to it that their suits are scheduled for trial.⁵³

Court rules may provide for advancing a case on the calendar on motion of the parties,⁵⁴ and for giving priority to certain civil actions.⁵⁵ Federal or "local" (district court) rules may also provide for notice of assignment of a case for trial,⁵⁶ transfer of cases from one calendar to another as between the separate "jury action" and "court action" calendars,⁵⁷ dismissal of a case from the calendar,⁵⁸ restoring a case to the calendar after it has been dismissed or stricken from the calendar,⁵⁹ and review of calendar orders.⁶⁰

§ 79. —Under Federal Rules of Criminal Procedure

The Federal Rules of Criminal Procedure state that the District Courts may

however, that a designee of the administrative judge may not designate yet another judge to perform the administrative duties assigned to him, such as changing the trial date of a case.

51. *United States v Raffoul* (CA3 Pa) 826 F2d 218, 14 Media LR 1534.

Generally as to trial publicity, see § 196.

52. See Federal Procedure, L Ed, Trial § 77:20.

Generally, the court has broad discretion in the making of trial assignments and in holding parties to assignments. *Janousek v French* (CA8 SD) 287 F2d 616, 4 FR Serv 2d 738 (construing FRCP 40).

■■■■ *Observation:* FRCP 40 should be read together with FRCP 16, which provides that a court may establish a calendar upon which pretrial proceedings before the court may be placed. Such a calendar may be confined to jury actions or to nonjury actions, or it may extend to all actions. See generally 62A Am Jur 2d, Pretrial Conference and Procedure.

53. 33 Federal Procedure, L Ed, Trial § 77:21.

■■■■ *Observation:* FRCP 79(a) provides that a district court clerk must keep, among other things, a civil docket book, indexes of the civil docket, and a court calendar. FRCP 79(c) requires the clerk to prepare under the direction of the court a calendar of all actions ready for trial. See 32 Am Jur 2d, Federal Practice and Procedure § 194.

54. 33 Federal Procedure, L Ed, Trial § 77:22.

Practice References: Motion and notice of motion to have cause assigned for trial. 1 Federal Procedural Forms, L Ed § 1:1346.

55. 33 Federal Procedure, L Ed, Trial §§ 77:23-25.

56. 33 Federal Procedure, L Ed, Trial § 77:26.

57. 33 Federal Procedure, L Ed, Trial § 77:27, discussing FRCP 79(c).

58. 33 Federal Procedure, L Ed, Trial § 77:28.

59. 33 Federal Procedure, L Ed, Trial § 77:29.

60. 33 Federal Procedure, L Ed, Trial § 77:30.

provide for placing criminal proceedings on appropriate calendars, and that preference shall be given to criminal proceedings as far as practicable.⁶¹

Comment: The Advisory Committee on Rules points out that this rule is merely a restatement of the inherent residual power of the court over its own calendars, although as a matter of practice in most districts the assignment of criminal cases for trial is handled by the United States Attorney. The direction that preference shall be given to criminal proceedings as far as practicable is generally recognized as desirable in the orderly administration of justice.⁶²

Case authority likewise holds that the federal court has broad power to make calendar adjustments if necessary to insure fundamental fairness.⁶³ It is also held that the trial court, which is a neutral arbiter for the defense as well as for the prosecution, must do all it can to keep its criminal dockets current, and if the judge is otherwise long committed in another case or is delayed in getting to criminal cases on his calendar by reason of illness, personal

61. FRCrP 50(a).

62. FRCrP 50, Notes of Advisory Committee on Rules.

63. *United States v Hasiwar* (SD NY) 299 F Supp 1053.

FRCrP Rule 50 codifies the inherent power of District Courts to control the assignment and transfer of cases to facilitate the business of the court and promote the expeditious administration of justice. *United States v Keane* (ND Ill) 375 F Supp 1201, later proceeding (CA7 Ill) 522 F2d 534, cert den 424 US 976, 47 L Ed 2d 746, 96 S Ct 1481, post-conviction proceeding (ND Ill) 678 F Supp 708, affd (CA7 Ill) 852 F2d 199, reh den, en banc (CA7) 1988 US App LEXIS 16016 and cert den 490 US 1084, 104 L Ed 2d 670, 109 S Ct 2109, application den 490 US 1104, 104 L Ed 2d 1017, 109 S Ct 3154 and reh den (US) 106 L Ed 2d 615, 109 S Ct 3271 and (disapproved by *McNally v United States*, 483 US 350, 97 L Ed 2d 292, 107 S Ct 2875, on remand (CA6 Ky) 841 F2d 1127, on remand (ED Ky) 705 F Supp 1224 and (not followed by *United States v Tuohey* (CA9 Cal) 867 F2d 534 and (superseded by statute as stated in *United States v Stoneman* (CA3 Pa) 870 F2d 102, cert den (US) 107 L Ed 2d 187, 110 S Ct 236) and (superseded by statute as stated in *United States v Munna* (CA5 La) 871 F2d 515, cert den (US) 107 L Ed 2d 955, 110 S Ct 871) and (superseded by statute as stated in *United States v Bortnovsky* (CA2 NY) 879 F2d 30, 28 Fed Rules Evid Serv 380, habeas corpus proceeding (SD NY) 1991 US Dist LEXIS 1929)) as stated in *United States v Runnels* (CA6 Mich) 833 F2d 1183, 126 BNA LRRM 2789, 107 CCH LC ¶ 10228, 24 Fed Rules Evid Serv 107 (disagreed with by *United States v Holzer* (CA7 Ill) 840 F2d 1343, later proceeding (ND

Ill) 1988 US Dist LEXIS 4828, revd (CA7 Ill) 848 F2d 822, cert den 488 US 928, 102 L Ed 2d 333, 109 S Ct 315 and cert den 486 US 1035, 100 L Ed 2d 608, 108 S Ct 2022 and (disagreed with by *United States v Osser* (CA3 Pa) 864 F2d 1056) and (superseded by statute as stated in *United States v Little* (CA5 Miss) 889 F2d 1367, reh den, en banc (CA5 Miss) 894 F2d 406 and cert den (US) 109 L Ed 2d 505, 110 S Ct 2176)) and later proceeding (CA6 Mich) 842 F2d 909 and (disagreed with by *United States v Shelton* (CA10 Okla) 848 F2d 1485 (disagreed with by *United States v Dynalectric Co.* (CA11 Ga) 859 F2d 1559, 1988-2 CCH Trade Cases ¶ 68347, 27 Fed Rules Evid Serv 1057, later proceeding 274 App DC 71, 861 F2d 730, 1988-2 CCH Trade Cases ¶ 68332, 27 Fed Rules Evid Serv 104 and cert den 490 US 1006, 104 L Ed 2d 157, 109 S Ct 1641, 109 S Ct 1642) and (superseded by statute as stated in *United States v Shyres* (CA8 Mo) 898 F2d 647, cert den (US) 112 L Ed 2d 43, 111 S Ct 69) and (disagreed with by multiple cases as stated in *United States v Bryant* (CMA) 30 MJ 72)) and (disagreed with by *United States v Zaubert* (CA3 NJ) 857 F2d 137, cert den 489 US 1066, 103 L Ed 2d 810, 109 S Ct 1340) and (disagreed with by *United States v Mandel* (CA4 Md) 862 F2d 1067, cert den 491 US 906, 105 L Ed 2d 699, 109 S Ct 3190, later proceeding (DC Md) 129 FRD 117, motion to vacate den (DC Md) 733 F Supp 235, later proceeding (DC Md) 745 F Supp 1132 and (disagreed with by *United States v Bush* (CA7 Ill) 888 F2d 1145) and (disagreed with by *United States v Craig* (CA7 Ill) 907 F2d 653, 17 FR Serv 3d 431, amd, reh den, en banc (CA7 Ill) 919 F2d 57)) and revd, en banc (CA6 Mich) 877 F2d 481, 131 BNA LRRM 2719, 112 CCH LC ¶ 11260.

misfortune or the press of business, this does not toll enforcement of the right of the defendant awaiting trial on that judge's criminal calendar.⁶⁴

The United States Attorney has the duty to press criminal cases to trial, to give them any necessary priority, and to prevent even the suggestion of staleness.⁶⁵ The fact that the Government informed defendants of its readiness in no way relieves it of its obligation to inform the court and filing a notice of readiness as to one codefendant is not compliance as to the others.⁶⁶ And the filing of a notice of readiness by the Government does not, in all cases, foreclose defendants from asserting that the Government is not in fact ready, but the fact that defendants may attempt to show that the Government's notice of readiness was meaningless does not suggest that the court should be required to determine in every case whether the Government was ready.⁶⁷

Another portion of the same Federal Rule, dealing with plans for achieving prompt disposition of criminal cases,⁶⁸ is discussed in another article.⁶⁹

§ 80. Preference to certain cases

In many jurisdictions, provision is made by statute or rule⁷⁰ for the grant of preferences to certain cases⁷¹ over others on the trial calendar, which are generally based either on the status or circumstances of a party⁷² or the nature or type of action involved.⁷³ Under such a provision, jurisdiction is not lost by delaying the trial.⁷⁴

Preferences are necessary when policy or justice demands a speedy determination of a particular action despite congested calendars, and statutes or rules providing for preferences are designed to single out cases which for some pressing reason deserve to be tried earlier than their calendar position would ordinarily allow. Accordingly, the granting of a statutory trial preference results in the placement of an action on the trial calendar ahead of all those actions which do not qualify for a preference under the statute or rule.⁷⁵ It has

64. *Hodges v United States* (CA8 Mo) 408 F2d 543.

65. *Hodges v United States* (CA8 Mo) 408 F2d 543.

66. *United States v Lazard* (SD NY) 386 F Supp 1145.

67. *United States v Pierro* (CA2 NY) 478 F2d 386.

68. FRCrP50(b).

69. 21A Am Jur 2d, Criminal Law § 661.

70. ■■■■ *Recommendation:* The reader is advised to consult the statutes or rules of the forum to determine what preferences are available and the procedure for obtaining them.

71. ■■■■ *Observation:* It has been indicated that the word "case" in a procedural rule identifying the proceedings which are to be given preference in scheduling for trials, hearings or arguments, obviously refers to whole lawsuits or appeals and not to the several issues or causes of action which may be presented, so that "case" thus would be synony-

mous with "action." *Rich v State*, 171 NJ Super 91, 407 A2d 1281.

72. § 81.

73. § 82.

74. *State ex rel. Mitchell v Medler*, 17 NM 644, 131 P 976; *Plachte v Bancroft, Inc.* (1st Dept) 3 App Div 2d 437, 161 NYS2d 892.

As to the preference of causes as denial of due process, see 16A Am Jur 2d, Constitutional Law § 844.

Generally as to stay of action, see 1 Am Jur 2d, Actions §§ 92 et seq.

75. *Green v Vogel* (2d Dept) 144 App Div 2d 66, 537 NYS2d 180.

Practice References: Obtaining preference on trial calendar. 3 Am Jur Trials 681, Tactics and Strategy of Pleading § 57.

Forms: Notice—Of motion for preferential trial setting. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 9.

—Motion for preferential trial setting. 18 Am Jur Pl & Pr Forms (Rev), Motions, Rules and Orders, Form 14; 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 10, 11.

been said, however, that a preference should be granted only where the circumstances are sufficiently unusual and extreme to justify the extraordinary privilege,⁷⁶ since the granting of a preference represents a favoring of one case over the many other cases awaiting trial.⁷⁷ Consequently, the courts have traditionally emphasized the exercise of appropriate restraint in the granting of applications for trial preferences, at least in those instances where the statutory ground upon which a preference is sought involves an element of judicial discretion.⁷⁸ In the final analysis, each case must essentially be decided on its own facts rather than a rigid set of prescribed rules.⁷⁹

The trial court does not have the mandatory duty to set a preferential trial date, even when a statute of limitations deadline approaches, but may exercise its discretion considering the total picture including such factors as: (1) plaintiff's diligence or lack thereof; (2) prejudice to defendant of an accelerated trial date; (3) the condition of the court's calendar; and (4) the likelihood of eventual mandatory dismissal if the early trial date is denied.⁸⁰ Of course, the state of a court's calendar is also a factor to be considered; however, calendar congestion alone is no reason to deny a motion for trial preference.⁸¹

Although the rules of procedure of a particular jurisdiction may authorize a court to grant a preference when the "interests of justice" will be served by an

—Affidavit in support of motion for preferential trial setting. 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 12-14.

—Order granting preferential trial setting. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 19.

76. *La Porta v Fretto Enterprises, Inc.* (3d Dept) 100 App Div 2d 713, 474 NYS2d 603; *Morris Electronics of Syracuse, Inc. v Stereo East Developments, Inc.* (4th Dept) 71 App Div 2d 1061, 420 NYS2d 811; *Smith v Schnabel* (3d Dept) 34 App Div 2d 603, 308 NYS2d 502.

In Texas, the practice rules expressly state that special or preferential settings will not be looked upon with favor and in no event, except in those cases entitled by law to a preferential setting, will such a setting be granted unless the case has been on file for at least 12 months and unless it is shown that manifest hardship will result if a preferential setting is not granted. But this rule, it has been held, comes into play when a party is complaining of the denial of a preferential setting, and does not apply where a preferential setting was granted. *Rosas v Bursey* (Tex App Fort Worth) 724 SW2d 402, holding that there was no harm in the preferential setting in this case, especially considering the fact that defendants admittedly requested the clerk of the court to set the cause for jury trial at the earliest opportunity.

77. *La Porta v Fretto Enterprises, Inc.* (3d Dept) 100 App Div 2d 713, 474 NYS2d 603; *Smith v Schnabel* (3d Dept) 34 App Div 2d 603, 308 NYS2d 502.

The granting of a trial preference in one action necessarily results in the further delay of

trial in another, and it is in derogation of the general rule requiring that when actions are advanced from one calendar to another they shall progress from the head of one calendar to the foot of the next calendar. *Green v Vogel* (2d Dept) 144 App Div 2d 66, 537 NYS2d 180.

78. *Green v Vogel* (2d Dept) 144 App Div 2d 66, 537 NYS2d 180.

The trial court may, in its discretion, grant a motion for special setting of a case for trial. *National Secretarial Service, Inc. v Froehlich* (2nd Dist) 210 Cal App 3d 510, 258 Cal Rptr 506, mod (2nd Dist) 210 Cal App 3d 1145h.

Where there are still pending discovery proceedings and a motion to consolidate the action with another action, which motion has been granted, the court's refusal to grant a trial preference is not an abuse of discretion. *Ludlam v Jones* (2d Dept) 131 App Div 2d 644, 516 NYS2d 726.

79. *Smith v Schnabel* (3d Dept) 34 App Div 2d 603, 308 NYS2d 502.

80. *Salas v Sears, Roebuck & Co.*, 42 Cal 3d 342, 228 Cal Rptr 504, 721 P2d 590 (holding, however, that plaintiffs, by their utter lack of diligence, forfeited their right to preferential setting for trial and were properly subject to dismissal); *Parlen v Golden State Sanwa Bank* (2nd Dist) 194 Cal App 3d 906, 240 Cal Rptr 73; *San Bernardino City Unified School Dist. v Superior Court* (4th Dist) 190 Cal App 3d 233, 235 Cal Rptr 356; *Dick v Superior Court* (2nd Dist) 185 Cal App 3d 1159, 230 Cal Rptr 297.

81. *Dick v Superior Court* (2nd Dist) 185 Cal App 3d 1159, 230 Cal Rptr 297.

early trial, it is not required to do so.⁸² In other words, whether the interests of justice will be served by the granting of a preference rests within the discretion of the trial court.⁸³

■■■■ Observation: A clear case of liability does not entitle a plaintiff to have the action preferred for trial over other actions on the calendar; if there is no bona fide issue of fact bearing on the liability issue, the plaintiff's remedy is to move for summary judgment.⁸⁴

Only one preference may be granted per action; multiple statutory preferences are not authorized, since the efficient and orderly calendaring of cases for trial would be rendered virtually impossible if multiple preferences were permitted.⁸⁵

§ 81. —Based on status or circumstances of party

Statutes or rules in many jurisdictions generally specify the special circumstances warranting calendar preference. Among the more common ones are a party's advanced age,⁸⁶ infancy,⁸⁷ destitution,⁸⁸ and severe illness.⁸⁹

■■■■ Illustration: In a case of first impression, a court held that a special trial preference may be granted when a party has AIDS (Acquired Immune Deficiency Syndrome) and is thereby in imminent danger of death.⁹⁰

■■■■ Observation: Provisions specifying special circumstances warranting

82. *Smith v Schnabel* (3d Dept) 34 App Div 2d 603, 308 NYS2d 502.

A libel action by attorneys who alleged that their professional reputation had been harmed was not entitled to a trial preference in the interests of justice, and it was an abuse of discretion to direct one. *Marks v Freidus* (2d Dept) 32 App Div 2d 964, 303 NYS2d 21.

83. *Nold v Troy* (3d Dept) 94 App Div 2d 930, 463 NYS2d 330.

84. *Turturro v Stevens* (2d Dept) 58 App Div 2d 601, 395 NYS2d 239; *Binninger v Grillo* (1st Dept) 28 App Div 2d 1100, 284 NYS2d 189.

85. *Green v Vogel* (2d Dept) 144 App Div 2d 66, 537 NYS2d 180.

86. *Swaithes v Superior Court* (2nd Dist) 212 Cal App 3d 1082, 261 Cal Rptr 41; *Tacinelli v Liberty Lines* (2d Dept) 123 App Div 2d 756, 507 NYS2d 230 (holding, however, that where no note of issue was served with or before the notice of motion seeking a trial preference on the ground that plaintiff was over 70 years of age, as required by the applicable procedure rule, the trial court improperly granted the preference).

87. *Peters v Superior Court* (2nd Dist) 212 Cal App 3d 218, 260 Cal Rptr 426, review den (holding that a statute providing that a civil case to recover damages for wrongful death or personal injury shall be entitled to preference upon motion of any party to the action who is

under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole, does not violate the separation of powers doctrine, nor does it violate equal protection or due process).

88. *Thompson v New York* (1st Dept) 140 App Div 2d 232, 528 NYS2d 77, later proceeding (1st Dept) 157 App Div 2d 634, 550 NYS2d 653, vacated, in part (1st Dept) 164 App Div 2d 773, 559 NYS2d 321.

Where a preference is based on a plaintiff's destitution, it must be shown that the defendant's negligence is the cause of such destitution. *Hillborn v Frank*, 132 Misc 2d 726, 504 NYS2d 993.

Forms: Affidavit—In support of motion for preferential trial setting—Allegation—Plaintiff financially unable to pay for needed surgery. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 14.

89. Thus, for example, a New York statute provides that a party who has a severe infirmity with a probability of death before a normally scheduled trial date is entitled to a special calendar preference and therefore an earlier trial date. See *Schneider v Flowers*, 137 Misc 2d 512, 521 NYS2d 647.

Forms: Affidavit—In support of motion for preferential trial setting—Allegation—Imminent death of witness. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 13.

90. *Schneider v Flowers*, 137 Misc 2d 512, 521 NYS2d 647.

calendar preference are usually held to be mandatory and absolute,⁹¹ and thus require that a litigant qualifying under their terms be given preferential trial setting irrespective of the circumstances leading to the motion for preference.⁹² Mere inconvenience to the court or other litigants is irrelevant, and failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference. The trial court has no power to balance the differing interests of opposing litigants in applying the provision.⁹³

The convenience of the witnesses may be a sufficient grounds for preference in some jurisdictions.⁹⁴

§ 82. —Based on nature or type of action

Some preferences are based on the nature or type of litigation involved. Thus, under some statutes or rules of procedure, a mandatory preference is given to actions to recover damages for medical or dental malpractice.⁹⁵ A claim for podiatric malpractice has been held to come within such provision.⁹⁶ A showing of special circumstances warranting relief is not required in order to obtain such a preference.⁹⁷

■■■■ Observation: The granting of a special preference for a malpractice case merely serves to give the action so designated a preference in order of trial over other cases receiving only a general preference; it does not entitle that case to a preference over all other preferred cases already on the calendar.⁹⁸

Under a rule requiring preferences in actions to recover damages for personal injuries resulting in permanent or protracted disability or for causing death, an action for assault does not fall within the ambit of such rule, since it need not involve personal injury, but only a grievous affront or threat to the person of the plaintiff.⁹⁹

It is within the court's discretion, provided justice so requires, to grant a

91. *Swaithes v Superior Court* (2nd Dist) 212 Cal App 3d 1082, 261 Cal Rptr 41 (advanced age); *Peters v Superior Court* (2nd Dist) 212 Cal App 3d 218, 260 Cal Rptr 426, review den (infancy); *Vinokur v Superior Court* (2nd Dist) 198 Cal App 3d 500, 243 Cal Rptr 683 (advanced age).

A statute providing a trial preference for a party over age of 70 years is mandatory and absolute in its application to qualified plaintiffs, and leaves no discretion to trial courts, either as a matter of inherent power or under the Code. It manifests a legislative determination that the specified age of 70 conclusively demonstrates the need for a preferential trial date to avoid an irrevocable loss of a qualifying plaintiff's substantive right to trial and recovery of damages during his or her lifetime. Were trial courts permitted to make administrative inroads in the mandate, its effectiveness would be eviscerated. *Koch-Ash v Superior Court* (2nd Dist) 180 Cal App 3d 689, 225 Cal Rptr 657, later proceeding (2nd Dist) 201 Cal App 3d 1242, 247 Cal Rptr 809, op withdrawn by order of ct, cert dismd 489 US 1074, 103 L Ed 2d 828, 109 S Ct 1522.

92. *Rice v Superior Court* (2nd Dist) 136 Cal App 3d 81, 185 Cal Rptr 853 (advanced age).

93. *Swaithes v Superior Court* (2nd Dist) 212 Cal App 3d 1082, 261 Cal Rptr 41 (advanced age).

94. **Forms:** Joint motion—For preferential trial setting—Statutory grounds—Convenience of witnesses. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 11.

95. *Doyle v Vashi*, 122 Misc 2d 899, 472 NYS2d 294.

96. *Hillborn v Frank*, 132 Misc 2d 726, 504 NYS2d 993.

97. *Hladik v Ellis Hospital* (3d Dept) 90 App Div 2d 584, 456 NYS2d 129.

98. *Doyle v Vashi*, 122 Misc 2d 899, 472 NYS2d 294.

99. *Di Gilio v William J. Burns International Detective Agency, Inc.* (2d Dept) 46 App Div 2d 650, 359 NYS2d 688.

motion for trial preference in a matrimonial action.¹ An action for divorce may be entitled to a preference where the court finds that justice requires a speedy resolution of the marital and financial issues raised by the parties.² A wife's support action instituted prior to the husband's divorce action has been given preference, since the results of the first trial would have substantial bearing on the second action.³ But a husband's demand for divorce has been held entitled to preference over the wife's suit for separation.⁴ Custody matters should receive priority considerations in scheduling and resolution.⁵

Various types of property actions have been given preference in a number of jurisdictions, such as actions for ejectment,⁶ unlawful detainer,⁷ or replevin.⁸

A suit to enforce a restrictive covenant in an employment agreement should be ordered to trial as a preferred matter in view of the actual competition which would result from a denial of immediate relief by temporary injunction.⁹

In suits involving injunctive relief, it has been stated that the trial judge, after granting temporary injunction, should give the case a preferred setting for an early trial on the merits so that the substantial questions involved in the litigation can be finally and expeditiously decided.¹⁰ And where the record in a receivership proceeding impels the conclusion that unless the rights of the parties are quickly determined financial disaster for both parties will be the end result of the litigation, the court may properly grant a preference so that a full trial may be had as early as possible.¹¹ Subrogation claims, similar to contribution and indemnity claims, are appropriate controversies for expedited presentation which can be pursued as contingent claims prior to payment under the third-party practice permitted by the applicable rules of procedure.¹²

But, where no statute or rule of court was cited to support a claim for preferential scheduling of an employment discrimination case, denial of such preference was held not to have been an abuse of discretion by the trial court.¹³

§ 83. —Criminal cases

The Federal Rules of Criminal Procedure provide that preference shall be

1. *Sterlace v Sterlace* (4th Dept) 63 App Div 2d 450, 406 NYS2d 934.

2. *Bucholtz v Bucholtz* (2d Dept) 43 App Div 2d 695, 349 NYS2d 789.

3. *Ayers v Ayers*, 269 NC 443, 152 SE2d 468.

4. *Land v Land* (La App 2d Cir) 483 So 2d 186.

5. *Doe v State, Dept. of Human Services, Div. of Youth & Family Services*, 165 NJ Super 392, 398 A2d 562.

6. *White v City Federal Sav. & Loan Assn.*, 47 Ala App 556, 258 So 2d 900, upholding the constitutionality of a statute granting preference to statutory ejectment actions in counties over a specified population.

7. *Mobil Oil Corp. v Superior Court of Los Angeles County* (2nd Dist) 79 Cal App 3d 486, 145 Cal Rptr 17; *Munden v Hazelrigg*, 105 Wash 2d 39, 711 P2d 295 (holding, however, that once an unlawful detainer action is converted to an ordinary civil action for damages,

the civil suit is no longer entitled to the calendar priority afforded an unlawful detainer action).

8. *Scutti Pontiac, Inc. v Rund*, 92 Misc 2d 881, 402 NYS2d 144.

9. *Seaman v Gines* (3d Dept) 83 App Div 2d 667, 442 NYS2d 596.

10. *Mejerle v Brookhollow Office Products, Inc.* (Tex App Dallas) 666 SW2d 192.

11. *Seakan v Hajec* (4th Dept) 27 App Div 2d 694, 276 NYS2d 921.

Forms: Motion—For preferential trial setting—Undue hardship to plaintiffs if early trial not granted. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 10.

12. *Attorneys' Title Ins. Fund, Inc. v Punta Gorda Isles, Inc.* (Fla App D2) 547 So 2d 1250, 14 FLW 1908.

13. *Continental Title Co. v District Court of Denver* (Colo) 645 P2d 1310, 48 BNA FEP Cas 219, 30 CCH EPD ¶ 33236.

given to criminal proceedings as far as practicable.¹⁴ This rule codifies the inherent power of the District Courts to control the assignment and transfer of cases to facilitate the business of the court and promote the expeditious administration of justice.¹⁵ Calendar adjustments may be necessary to insure fundamental fairness,¹⁶ since the accused's constitutional right to a speedy trial¹⁷ cannot depend upon the vagaries of a particular judge's calendar.¹⁸

In addition, in order to minimize undue delay and to further the prompt disposition of criminal cases, the Federal Rules require each District Court to conduct a continuing study of the administration of criminal justice and prepare plans for the prompt disposition of criminal cases¹⁹ in accordance with the Speedy Trial Act.²⁰

The Uniform Rules of Criminal Procedure state that, insofar as is practicable, trials of criminal cases shall have priority over civil cases. In determining priority among criminal cases, the court shall consider, among others, the following factors: (1) the right of a defendant to a prompt trial; (2) whether the defendant is in custody; (3) the relative gravity of the offense charged; and (4) the relative complexity of the case.²¹ Upon motion of a party and a showing of cause, the court may advance the case on the calendar.²²

■■■■ Observation: It has been said that the federal courts have a drug problem. Narcotics cases are clogging the calendars and pushing civil cases down the list. The reason is easy to spot: criminal cases rose 59 percent during the 1980's—of those, drug cases soared by 280 percent—while civil cases rose by just 39 percent. The result is that, on average, it takes criminal cases five months from the time of filing to trial, but civil cases take 14 months. However, various reform efforts have drawn powerful opposition.²³

§ 84. Short-cause calendar

Some statutes or rules of practice provide for a short-cause calendar in certain courts, on which may be placed cases which can be tried within certain

14. FRCrP 50(a).

15. *United States v Keane* (ND Ill) 375 F Supp 1201, later proceeding (CA7 Ill) 522 F2d 534, cert den 424 US 976, 47 L Ed 2d 746, 96 S Ct 1481.

16. *United States v Hasiwar* (SD NY) 299 F Supp 1053.

17. US Const Amend 6. Generally as to right to speedy trial, see 21A Am Jur 2d, Criminal Law §§ 652-663 (under federal court decisions), 849-875 (under state court decisions); 9 Federal Procedure, L Ed, Criminal Procedure §§ 22:725 et seq.

18. *Hodges v United States* (CA8 Mo) 408 F2d 543.

19. FRCrP 50(b).

The principal aim of FRCrP 50(b) and the plans for prompt disposition of criminal cases promulgated pursuant thereto is to promote

and safeguard the public interest in quick, efficient functioning of the criminal justice process rather than to expand the accused's right to a speedy trial. *United States v Wyers* (CA5 Ga) 546 F2d 599.

20. 18 USCS §§ 3161 et seq.

Rule 50(b) continues to provide authority for promulgation by the district court of the Virgin Islands of a plan for prompt disposition of criminal cases tried before it, including those cases based on territorial crimes, despite inapplicability to such cases by the terms of the Speedy Trial Act. *Government of Virgin Islands v Bryan* (CA3 VI) 818 F2d 1069.

21. Unif R Crim P Rule 721(b).

22. Unif R Crim P Rule 721(c).

23. *Business Week*, March 26, 1990, pp 76, 77.

time limits, and such a statute is not unconstitutional even though only the plaintiff is given the right to place a case on the calendar.²⁴

Under the practice rules of at least one jurisdiction, the responsibility for placing matters on the short calendar rests with the clerk of the court for those matters entitled to automatic assignment. Short calendar lists are required to be distributed to attorneys and to pro se parties of record. All other matters appropriate for short calendar may be placed thereon only by order of the court. Neither the clerk nor any attorney or pro se party has any authority to have a matter written on the short calendar without the approval of the court and reasonable notice to other parties of record.²⁵ A provision concerning cases on the short calendar list has been held to mean that a plea in abatement is to go on the calendar only when (a) the issues are closed and (b) when they are closed and claimed to the court as opposed to a jury.²⁶

§ 85. Transfer of causes

In many states,²⁷ and in the federal courts,²⁸ legal and equitable remedies have been merged in one form of action, and distinctions between actions at law and suits in equity have been abolished. In a case arising in a state having such a merger rule, there is no necessity to transfer a case from the equity side to the law side of the court, or vice versa,²⁹ at least if the amount in controversy is within the jurisdiction of the court.³⁰ However, where the distinction between law and equity proceedings is still maintained, and both law and equity dockets are kept, causes may be transferred from one docket to the other in a proper situation.³¹ A cause should not be dismissed where it is initiated on the "wrong" side, but should instead be transferred to the proper side.³² Thus, a law case may be transferred to the equity side of the court where an equitable claim or defense is pleaded,³³ and a case wrongfully

24. *Louisville, N.A. & C.R. Co. v Wallace*, 136 Ill 87, 26 NE 493.

Forms: Notice of readiness for trial—Request to place cause on short-cause calendar. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 3.

25. *Evergreen Cooperative, Inc. v Michel*, 36 Conn Supp 541, 418 A2d 99.

26. *Wetmore v Wrynn*, 32 Conn Supp 249, 349 A2d 857.

27. See generally 27 Am Jur 2d, Equity § 4.

28. Under the Federal Rules of Civil Procedure there is one form of action known as a "civil action." See FRCP 2, discussed in 1 Am Jur 2d, Actions §§ 28, 30.

29. *Emery v International Glass & Mfg., Inc.* (Fla App D2) 249 So 2d 496; *Stugelmayer v Ulmer* (SD) 260 NW2d 236.

30. *Emery v International Glass & Mfg., Inc.* (Fla App D2) 249 So 2d 496.

31. *W & H Machine & Tool Co. v National Distillers & Chemical Corp.*, 291 Ala 517, 283 So 2d 173; *Brixey v Booneville*, 285 Ark 350, 687 SW2d 126, 84 OGR 460; *Rao Electrical Equipment Co. v MacDonald Engineering Co.*

(1st Dist) 124 Ill App 2d 158, 260 NE2d 294; *First Nat. Bank v Curran* (Iowa) 206 NW2d 317; *Gilley v Jernigan* (Tenn App) 597 SW2d 313; *Seventeen, Inc. v Pilot Life Ins. Co.*, 215 Va 74, 205 SE2d 648.

32. *Liberty Oil Co. v Condon Nat. Bank*, 260 US 235, 67 L Ed 232, 43 S Ct 118; *Broderick v American General Corp.* (CA4 Md) 71 F2d 864, 94 ALR 1359; *Claeys v Moldenshardt* (Iowa) 169 NW2d 885; *Yule v Crowley*, 249 Md 260, 239 A2d 87; *Moore v Mississippi Hospital & Medical Service* (Miss) 317 So 2d 919; *Klemow v Time, Inc.*, 446 Pa 189, 352 A2d 12, cert den 429 US 828, 50 L Ed 2d 91, 97 S Ct 86; *Kuriger v Cramer*, 345 Pa Super 595, 498 A2d 1331 (compulsory nonsuit held improper).

33. *Liberty Oil Co. v Condon Nat. Bank*, 260 US 235, 67 L Ed 232, 43 S Ct 118; *W & H Machine & Tool Co. v National Distillers & Chemical Corp.*, 291 Ala 517, 283 So 2d 173; *Herrick v Robinson*, 267 Ark 576, 595 SW2d 637, 29 UCCRS 549; *Smith v State Farm Mut. Auto. Ins. Co.* (Iowa) 248 NW2d 903; *Dilworth v Federal Reserve Bank*, 170 Miss 373, 150 So 821, adhered to 170 Miss 390, 154 So 535, 92 ALR 1076; *Gilley v Jernigan* (Tenn App) 597 SW2d 313.

instituted in the equity court should be ordered to be transferred to the law court.³⁴ But, if an equitable cause is disclosed, the case should not be transferred from the equity docket to the law docket.³⁵ And, refusal of a court of equity, acting within its authority, to transfer a cause to the law side of the court will not be interfered with on appeal.³⁶

Statutes providing for transfers from one side of the court to the other are viewed as remedial, and thus to be liberally construed to effectuate their purpose.³⁷ Still, the transfer of a case from law to equity, or conversely, is authorized only where the relief requested cannot be granted in the particular court in which the case is brought.³⁸ An improper transfer from law to equity is deemed to be prejudicial error since it denies the affected party of the right to a jury trial.³⁹ A party may waive the right to have a suit transferred from the law side to the equity side, or vice versa,⁴⁰ as by failing to object.⁴¹

■■■■ Observation: Case authority is divided on the question whether the court may transfer a cause on its own motion.⁴²

■■■■ Reminder: A motion to transfer must be timely made.⁴³

A motion to transfer a lawsuit to equity was properly denied where no equitable defense was pled except the defense of laches, which was held by the court to be inapplicable because the action was one at law brought within the statute of limitations. *Rogers Iron & Metal Corp. v K & M, Inc.*, 22 Ark App 228, 738 SW2d 110.

Forms: Transfer from law to equity court. 9 Am Jur Pl & Pr Forms (Rev), Equity, Forms 51, 53.

34. *White v Sparkill Realty Corp.*, 280 US 500, 74 L Ed 578, 50 S Ct 186; *Twist v Prairie Oil & Gas Co.*, 274 US 684, 71 L Ed 1297, 47 S Ct 755; *Brooks v Ward*, 287 Ala 609, 254 So 2d 175; *Compute-A-Call, Inc. v Tolleson*, 285 Ark 355, 687 SW2d 129; *Ording v Springer* (1st Dist) 88 Ill App 3d 243, 43 Ill Dec 428, 410 NE2d 428; *Trachtenburg v Sibarco Stations, Inc.*, 477 Pa 517, 384 A2d 1209; *Seventeen, Inc. v Pilot Life Ins. Co.*, 215 Va 74, 205 SE2d 648.

Forms: Transfer of cause from equity to law court. 9 Am Jur Pl & Pr Forms (Rev), Equity, Forms 52, 54.

35. *Crisp County v S.J. Groves & Sons Co.* (CA5 Ga) 73 F2d 327, 96 ALR 391.

36. *Rice & Adams Corp. v Lathrop*, 278 US 509, 73 L Ed 480, 49 S Ct 220.

37. *Curl v Putman*, 286 Ala 85, 237 So 2d 475; *Ex parte Garner*, 280 Ala 111, 190 So 2d 544.

38. *Fisher v Tyler*, 24 Md App 663, 332 A2d 265, later app 38 Md App 616, 382 A2d 338, affd 284 Md 100, 394 A2d 1199, 5 ALR4th 625.

39. *Fisher v Tyler*, 24 Md App 663, 332 A2d

265, later app 38 Md App 616, 382 A2d 338, affd 284 Md 100, 394 A2d 1199, 5 ALR4th 625; *Thompson v First Mississippi Nat. Bank & Mut. Sav. Life Ins. Co.* (Miss) 427 So 2d 973 (ovrld on other grounds by *Tideway Oil Programs, Inc. v Serio* (Miss) 431 So 2d 454, 58 ALR4th 819); *Stanardsville Volunteer Fire Co. v Berry*, 229 Va 578, 331 SE2d 466.

40. *Walker v Dibble*, 241 Ark 692, 409 SW2d 333; *Galvin v Suchomel* (Iowa) 186 NW2d 662; *Claeys v Moldenshardt* (Iowa) 169 NW2d 885; *Shepherd v Gass*, 260 Or 84, 488 P2d 1180.

41. *Penrod Drilling Co. v Bounds* (Miss) 433 So 2d 916.

42. As holding that the court may transfer a cause from one side to the other on its own motion, see *Stolz v Franklin*, 258 Ark 999, 531 SW2d 1; *Government Employees Ins. Co. v Butler*, 128 NJ Super 492, 320 A2d 515.

If relief may be had by action at law, it seems that the court, of its own motion, may not transfer the case from the law side to the equity side. *Gauthier v Peiter*, 267 Mich 667, 255 NW 385, 93 ALR 1522.

As holding that the court is not required to transfer the cause on its own motion, see *Penrod Drilling Co. v Bounds* (Miss) 433 So 2d 916.

43. *Schoenthal v Irving Trust Co.*, 287 US 92, 77 L Ed 185, 53 S Ct 50 (superseded by statute as stated in *Re Harbour* (CA4 Va) 840 F2d 1165, 17 BCD 369, 18 CBC2d 627, CCH Bankr L Rptr ¶ 72208, vacated (US) 106 L Ed 2d 582, 109 S Ct 3234 and (disagreed with by multiple cases as stated in *Re Davis* (CA11 Ga) 899 F2d 1136, 23 CBC2d 555, CCH Bankr L Rptr ¶ 73369, reh den, en banc (CA11 Ga) 908

In some jurisdictions, cases speak of the transfer of causes to a small claims docket,⁴⁴ a liquidation calendar,⁴⁵ an inactive calendar,⁴⁶ or from a deferred calendar to a ready or day calendar.⁴⁷

Transfers of cases involving juvenile offenders as between juvenile courts and criminal courts are discussed in another article.⁴⁸

§ 86. Striking case from calendar

A court may, for good cause, strike a case from the calendar.⁴⁹ Thus, a case may be stricken from the calendar where extensive discovery has yet to be completed.⁵⁰ A stipulation by the parties in open court to mark the action off the calendar to pursue other legal matters relevant to the action, even absent a writing, is binding on the parties.⁵¹ Where the court has removed a case from the civil active list for an improper reason, an appellate court may issue a peremptory writ to order its restoration.⁵²

If a mandatory procedural rule governing setting of a case for trial is not complied with, the failure of defendant to request the court to remove the action from the calendar will not validate the subsequent judgment.⁵³

§ 87. Restoration of case to calendar

Under some procedural rules, a case struck from the calendar and not restored within 1 year thereafter is deemed abandoned and is automatically

F2d 980 and reh den, en banc (CA11 Ga) 908 F2d 980 and cert den (US) 112 L Ed 2d 522, 111 S Ct 510)); *Gilmore v Shearer*, 197 Iowa 506, 197 NW 631, 32 ALR 733; *Hartford Fire Ins. Co. v Haas*, 87 Ky 531, 9 SW 720; *Dilworth v Federal Reserve Bank*, 170 Miss 373, 150 So 821, adhered to 170 Miss 390, 154 So 535, 92 ALR 1076.

44. *Robertson v Martin* (Okla) 613 P2d 1049.

45. *Lindheimer v Baylor* (1st Dist) 5 Ill App 3d 114, 283 NE2d 298, affd 54 Ill 2d 433, 298 NE2d 167.

46. *Black v Greer*, 17 Ariz App 383, 498 P2d 225 (disagreed with by *Cline v Tigor Title Ins. Co.* (App) 154 Ariz 343, 742 P2d 844); *National Freight, Inc. v Ostroff*, 133 NJ Super 554, 337 A2d 647.

Transfer to an inactive calendar is to occur where a motion to set trial and certificate have not been filed within a specified number of days after the service of the summons and complaint. *Evron v Gilo* (Alaska) 777 P2d 182, holding that the case was prematurely placed on the inactive calendar, but counsel had an opportunity to point out the error prior to dismissal of the case and did not do so, barring such claim on appeal.

47. *Nuness v International Harvester Co.* (3d Dept) 35 App Div 2d 1056, 316 NYS2d 468; *Clark v Cunningham* (3d Dept) 26 App Div 2d 715, 271 NYS2d 910.

48. 47 Am Jur 2d, *Juvenile Courts and Delinquent and Dependent Children* §§ 19, 40.

49. *Maximum Technology v Superior Court* (1st Dist) 188 Cal App 3d 935, 233 Cal Rptr 733, review gr, transf (Cal) 242 Cal Rptr 196, 745 P2d 917.

50. *Carte v Segall* (2d Dept) 134 App Div 2d 396, 520 NYS2d 943, later proceeding (2d Dept) 134 App Div 2d 397, 520 NYS2d 944 (noting that plaintiffs were clearly cognizant that discovery was not completed when they filed the certificate of readiness falsely declaring that preliminary proceedings had been either completed or waived).

But, the trial court did not abuse its discretion in refusing to strike proceedings from the trial calendar based on an allegation that discovery proceedings had not yet been completed, where portions of the consolidated proceedings had been pending for over 9 years, thus providing appellants with an ample opportunity to conduct discovery proceedings, and where the court ordered that all discovery be completed by a certain day. *Long Island Lighting Co. v Assessor of Brookhaven* (2d Dept) 122 App Div 2d 794, 505 NYS2d 679.

51. *Sannella v Plainview Fire Dept.* (2d Dept) 136 App Div 2d 617, 523 NYS2d 593.

52. § 87.

53. *Bennett v Continental Chemicals, Inc.* (Fla App D1) 492 So 2d 724, 11 FLW 1587.

dismissed for failure to prosecute,⁵⁴ but after the 1-year period the court has the discretionary power to restore the case to the calendar if the movant establishes that there was a lack of intent to abandon the case, that the cause of action is meritorious, that there is a sufficient excuse for the delay, and that defendant has not been prejudiced.⁵⁵ A cause of action may also be restored to the trial calendar by stipulation of the parties.⁵⁶ Where the court has removed a case from the civil active list for an improper reason, an appellate court may issue a peremptory writ of mandate to order its restoration.⁵⁷

Where a review of the record discloses that pretrial discovery had not been completed, due in substantial part to the defendants' dilatory conduct, the action should be restored to the ready calendar with directions to the parties to expeditiously complete pretrial discovery.⁵⁸

§ 88. —Sufficiency of proof

There is a considerable body of case law determining whether, under the particular facts and circumstances, the moving party seeking restoration of the case to the trial calendar made a sufficient showing of lack of intent to abandon the case, the meritorious nature of the cause of action, excuse for the delay, and absence of prejudice to the defendant.⁵⁹ Since a case, as a general rule, is marked off the calendar or a note of issue stricken because of an act or omission in the nature of a default, the standard of proof required for restoring the action to the calendar has been said to be essentially the same as the standard for setting aside a default judgment.⁶⁰

Generally, a plaintiff can show lack of intent to abandon by showing that

54. *Leone v Bates Plan-A-Home of Sidney, Inc.* (3d Dept) 144 App Div 2d 759, 534 NYS2d 751; *Malpass v Mavis Tire Supply Corp.* (2d Dept) 143 App Div 2d 890, 533 NYS2d 397; *Mamet v Mamet* (1st Dept) 132 App Div 2d 479, 518 NYS2d 5, app den 70 NY2d 611, 523 NYS2d 495, 518 NE2d 6 (matrimonial action).

55. *Leone v Bates Plan-A-Home of Sidney, Inc.* (3d Dept) 144 App Div 2d 759, 534 NYS2d 751; *Malpass v Mavis Tire Supply Corp.* (2d Dept) 143 App Div 2d 890, 533 NYS2d 397; *La Froschia Constr. Corp. v Yonkers* (2d Dept) 140 App Div 2d 496, 528 NYS2d 604; *Tucker v Hotel Employees & Restaurant Employees Union, Local 100* (2d Dept) 134 App Div 2d 494, 521 NYS2d 279.

As to sufficiency of the proof, see § 88.

56. *Nuckel v Giltner* (3d Dept) 124 App Div 2d 957, 508 NYS2d 708.

A case was properly restored to the trial calendar where it appeared that the action was not voluntarily discontinued, the record indicating that the parties intended to execute, but never did execute (or file with the clerk of the court), a formal stipulation discontinuing the action. *Millicent Bender, Inc. v J.D. Posillico, Inc.* (2d Dept) 144 App Div 2d 548, 534 NYS2d 412.

57. *Maximum Technology v Superior Court* (1st Dist) 188 Cal App 3d 935, 233 Cal Rptr 733, review gr, transf (Cal) 242 Cal Rptr 196, 745 P2d 917.

58. *White v Smith* (2d Dept) 126 App Div 2d 635, 511 NYS2d 72.

59. *Leone v Bates Plan-A-Home of Sidney, Inc.* (3d Dept) 144 App Div 2d 759, 534 NYS2d 751; *Malpass v Mavis Tire Supply Corp.* (2d Dept) 143 App Div 2d 890, 533 NYS2d 397 (holding that plaintiffs succeeded in sustaining their burden on all requisites for restoration of the case); *La Froschia Constr. Corp. v Yonkers* (2d Dept) 140 App Div 2d 496, 528 NYS2d 604 (holding that plaintiff's proof was inadequate); *Kharrubi v Board of Education* (2d Dept) 133 App Div 2d 457, 519 NYS2d 671 (holding that proof was inadequate); *Public Admr. of County of New York v Heil Corp.* (2d Dept) 126 App Div 2d 533, 510 NYS2d 655 (holding that the motion papers failed to satisfy any of the requirements); *Smigel v Rensselaerville* (3d Dept) 125 App Div 2d 847, 510 NYS2d 34 (holding that plaintiff proved all requisites).

60. *Balducci v Jason* (2d Dept) 133 App Div 2d 436, 519 NYS2d 656; *Fluman v TSS Dept. Store* (2d Dept) 100 App Div 2d 838, 473 NYS2d 835.

there was some activity in the case during the year before dismissal.⁶¹ Plaintiff was held to have sufficiently rebutted the statutory presumption of abandonment of the action where she provided evidence of her ongoing attempts to procure a new expert witness and to replace a medical expert who withdrew from the case on the eve of trial.⁶² And the presumption of abandonment was rebutted by proof of the injured plaintiff's continuing medical treatment and his attorney's ongoing efforts to acquire necessary documentation and medical records.⁶³ A case is not deemed abandoned where it was removed from the trial calendar by mutual consent of the parties.⁶⁴

A mere conclusory statement that the plaintiff has a meritorious cause of action, without supporting evidence, is inadequate.⁶⁵ And the court does not abuse its discretion in refusing to restore the case or vacate the dismissal thereof where plaintiffs failed to include an affidavit of merit, their reference to the trial testimony on damages not satisfying this requisite.⁶⁶

Plaintiff must also put forward a justifiable excuse for failing to move to restore the case within 1 year of its dismissal for failure to prosecute. Most claims of excusable delay based on various types of law office failures have been unsuccessful.⁶⁷ It has been held that negotiations for settlement do not provide an excuse for delay in proceeding to trial, beyond a brief interval after the last communication.⁶⁸ On the other hand, counsel's disabling illness and a purported understanding that defense counsel would mark the case ready for trial have been held to constitute a reasonable excuse.⁶⁹ Furthermore, a trial court was held to have abused its discretion in denying a motion to reset a case for trial where defendants' counsel had a conflict with a court setting in another county and the attorney appeared personally before the court to answer all inquiries pertinent to the conflict that the court cared to make.⁷⁰

Prejudice to defendant from plaintiff's delay in restoring the case to the calendar may generally be shown by the passage of many years, so that witnesses' memories have dimmed and vital proof may have disappeared,

61. *Curtin v Grand Union Co.* (3d Dept) 124 App Div 2d 918, 508 NYS2d 333 (wherein the court noted that such activity, primarily consisting of correspondence between plaintiff's counsel and an expert and defendant's counsel, was present in the case).

62. *Ford v Empire Medical Group* (2d Dept) 123 App Div 2d 820, 507 NYS2d 436.

63. *Sheehan v Hollywood* (2d Dept) 112 App Div 2d 211, 491 NYS2d 432.

64. *Denver v American Home Products Corp.* (2d Dept) 138 App Div 2d 670, 526 NYS2d 485.

65. *Public Admr. of County of New York v Heil Corp.* (2d Dept) 126 App Div 2d 533, 510 NYS2d 655; *Friedberg v Bay Ridge Orthopedic Associates, P.C.* (2d Dept) 122 App Div 2d 194, 504 NYS2d 731.

An affidavit of the plaintiff and the affirmation of her attorney were held insufficient to sustain the burden of proof where they were conclusory, not based on personal knowledge,

and unsupported by any corroborative documents or evidence. *Giammanco v New York* (2d Dept) 124 App Div 2d 642, 507 NYS2d 895.

66. *Leone v Bates Plan-A-Home of Sidney, Inc.* (3d Dept) 144 App Div 2d 759, 534 NYS2d 751.

67. See, for example, *Mauro v Techni-Plate, Inc.* (2d Dept) 96 App Div 2d 835, 465 NYS2d 589; *Catalfamo v Flushing Nat. Bank* (2d Dept) 91 App Div 2d 967, 457 NYS2d 337; *Zito v Morawski* (2d Dept) 79 App Div 2d 707, 434 NYS2d 262.

68. *Cislo v Di Pasquale* (4th Dept) 51 App Div 2d 874, 380 NYS2d 143.

69. *Smigel v Rensselaerville* (3d Dept) 125 App Div 2d 847, 510 NYS2d 34.

70. *Thrower v Johnston* (Tex App Dallas) 775 SW2d 718 (noting the trial court's unyielding attitude and its failure to attempt to resolve the conflict by telephoning the other judge).

impeding defendant's ability to defend the case at trial.⁷¹ Restoration of a cause of action and conduct of a trial many years after an accident, and some years after settlement, has been held unwarranted.⁷² But, in an action for negligent construction and/or maintenance of an intersection by the defendant town, it was held that the town did not satisfactorily demonstrate how it would be prejudiced by returning the case to the calendar, particularly in view of the requirements the court had imposed on plaintiff's counsel personally to ensure an early trial.⁷³

§ 89. —Medical malpractice cases

Where the cause of action is for medical malpractice, it is incumbent on the plaintiff to submit an affidavit by a physician or other qualified expert.⁷⁴ A court was held to have improperly vacated dismissal of a medical malpractice action and restored the case to the trial calendar where plaintiff failed to establish the legal merits of the action by an affidavit from a physician competent to attest to the meritorious nature of the claim.⁷⁵ A physician's affidavit merely stating the opinion that plaintiff "has a good and meritorious cause of action," without specifying any acts on the part of defendants which constituted a departure from accepted medical practice, and without even stating that plaintiff was a victim of medical malpractice, fails to establish a meritorious claim by plaintiff.⁷⁶ But, it was been held not to have been an improvident exercise of discretion to grant a plaintiff's motion to restore a malpractice action to the trial calendar, albeit no affidavit of merit by a medical expert had been proffered in support of the original application, where the action was not marked off the calendar due to any default on the plaintiff's part, and the motion to restore was not untimely.⁷⁷

§ 90. —Imposition of conditions or terms

Where a case has been voluntarily nonsuited, later refiled, and then struck from the active roster, during which time plaintiff had frequent changes of

71. *Rodriguez v Middle Atlantic Auto Leasing, Inc.* (1st Dept) 122 App Div 2d 720, 511 NYS2d 595, app dismd 69 NY2d 874, 514 NYS2d 723, 507 NE2d 317.

The trial court did not abuse its discretion in denying plaintiff's motion to restore an action for damages for breach of an employment contract to the trial calendar where defendant, who was concededly a crucial witness, died just prior to the bringing of plaintiff's motion, the whereabouts of two nonparty defense witnesses were unknown, and an insufficient showing was made to excuse plaintiff's failure to proceed expeditiously. *Tucker v Hotel Employees & Restaurant Employees Union, Local 100* (2d Dept) 134 App Div 2d 494, 521 NYS2d 279.

72. *Rosado v Rosado* (1st Dept) 123 App Div 2d 292, 506 NYS2d 444.

73. *Smigel v Rensselaerville* (3d Dept) 125 App Div 2d 847, 510 NYS2d 34.

74. *Wulster v Rubinstein* (2d Dept) 126 App Div 2d 545, 510 NYS2d 668, app dismd 70 NY2d 694, 518 NYS2d 1031, 512 NE2d 557, vacated 70 NY2d 723, 519 NYS2d 642, 513

NE2d 1303 (holding that where plaintiffs instead sought to establish the merit of their claim merely by submitting the deposition testimony of the parties, a copy of the verified complaint, copies of X-rays taken by the defendant hospital, and a copy of a discharge report prepared by another hospital which set forth the plaintiff's medical history, such documents were insufficient, as they failed to contain a statement of opinion by a medical expert to the effect that the treatment rendered had been below acceptable standards and caused plaintiff's injuries, so that it was error to grant the plaintiffs' motion to restore the case to the trial calendar).

75. *Paglia v Agrawal* (2d Dept) 124 App Div 2d 793, 508 NYS2d 514, app dismd 69 NY2d 946, 516 NYS2d 658, 509 NE2d 353.

76. *Friedberg v Bay Ridge Orthopedic Associates, P.C.* (2d Dept) 122 App Div 2d 194, 504 NYS2d 731.

77. *Balducci v Jason* (2d Dept) 133 App Div 2d 436, 519 NYS2d 656.

counsel, the court could properly require plaintiffs to pay defendant's costs as a condition of restoring the case to the active roster, but attorneys' fees would not be included in the term "costs."⁷⁸

■■■■ Observation: In at least one jurisdiction, there is case authority holding that the court may condition restoration of a case to the calendar on the personal payment of a specified sum to the defendant by the plaintiff's attorney as costs or a sanction, where the attorney's neglect or lack of diligence was a contributing cause of failure to timely prosecute the case initially.⁷⁹

B. PRETRIAL MOTIONS; MOTION IN LIMINE PRACTICE [§§ 91-114]

Research References

ALR Digest to 3d, 4th, and Federal, Motions and Orders §§ 1 et seq.; Trial §§ 1.7, 10, 35.3

Index to Annotations, Exclusion or Suppression of Evidence; In Limine; Preliminary or Pretrial Matters; Trial

23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 61:1-61:5, 62, 71

5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases; 20 Am Jur Trials 441, Motion in Limine Practice

Bailey & Rothblatt, Successful Techniques for Criminal Trials (2d ed, 1985) §§ 4:10 et seq.

Carlson, Successful Techniques for Civil Trial (1983), Ch 1

Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) §§ 14:1 et seq., 16:8

Swartz & Swartz, Handbook of Personal Injury Forms & Litigation (1982) §§ 6:14 et seq.

1. IN GENERAL [§§ 91-93]

§ 91. Generally

A variety of motions may be brought by the plaintiff's attorney prior to trial.⁸⁰ However, variations exist among the jurisdictions. The defendant uses motion practice to weaken or eliminate plaintiff's case. While appropriate for the defendant, such a use of motion practice makes little sense for the plaintiff. Plaintiff's motions seek to terminate the case or some aspect of the case only in the rarest of instances.⁸¹ The most common purpose of statutory provisions regarding the filing of pretrial motions is to prevent interruption of trials, avoid the effort and expense of useless trials, and to protect juries from exposure to inadmissible evidence.⁸² Pretrial motions are to be construed so as to do substantial justice with substance controlling over form.⁸³

⁷⁸. Shuler v Crook, 290 SC 538, 351 SE2d 862.

⁷⁹. Simon v Avis Rent-A-Car, Inc. (2d Dept) 127 App Div 2d 583, 511 NYS2d 384; Sheehan v Hollywood (2d Dept) 112 App Div 2d 211, 491 NYS2d 432; Sygman v Pep Fashions, Ltd. (1st Dept) 87 App Div 2d 787, 449 NYS2d 499.

⁸⁰. **Practice References:** Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 14:1. The authors

provide a partial list of motions which a plaintiff may bring.

⁸¹. **Practice References:** Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) §§ 14:1 et seq.

As to motion practice in general, see 56 Am Jur 2d, Motions, Rules, and Orders.

⁸². State v Wilkerson (La App 2d Cir) 448 So 2d 1355, cert den, prohibition den, mand den (La) 450 So 2d 361.

A trial court has discretion to rule on pretrial motions before trial and must rule before trial on motions to suppress as well as other pretrial motions that are capable of determination without the trial of the general issue.⁸⁴ A pretrial motion is generally "capable of determination" before trial if it involves questions of law rather than fact.⁸⁵ Generally, questions of admissibility, relevance, and weight of evidence are properly resolved at trial on the merits, not by pretrial motions.⁸⁶

Caution: When a party fails to bring a motion to the attention of the trial judge and have the judge rule upon the motion prior to trial, the party waives the issues raised in the motion.⁸⁷

§ 92. Criminal cases

Where a criminal procedure statute prescribes a minimum, fixed time period in which a defendant may make pretrial motions, such provision is intended to carefully balance considerations of judicial economy with defendant's need for adequate time in which to prepare and make pretrial motions, and a trial court may not, *sua sponte*, alter this statutory time period.⁸⁸ On the other hand, a trial court may, in the interest of justice, extend the period in which a pretrial motion must be filed provided involved parties will not be prejudiced thereby.⁸⁹ The timeliness of a defendant's pretrial motions must be determined in relation to the final trial date, not the original trial date.⁹⁰ The starting point

83. *Kennewick v Vandergriff*, 45 Wash App 900, 728 P2d 1071, review gr 107 Wash 2d 1037 and revd on other grounds, en banc 109 Wash 2d 99, 743 P2d 811.

84. *United States v Vest* (DC Mass) 639 F Supp 899, affd (CA1 Mass) 813 F2d 477, later proceeding (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489 and (disagreed with by multiple cases as stated in *United States v Hurst* (CMA) 29 MJ 477, 29 Fed Rules Evid Serv 1252).

When a party files a motion prior to trial, the motion is to be heard and determined before trial unless the trial judge, for good cause shown, directs that the hearing be deferred and the merits of the motion determined at a later date. *State v Aucoin* (Tenn Crim) 756 SW2d 705, cert den 489 US 1084, 103 L Ed 2d 845, 109 S Ct 1541, reh den 490 US 1077, 104 L Ed 2d 655, 109 S Ct 2092.

85. *United States v Shortt Accountancy Corp.* (CA9 Cal) 785 F2d 1448, 86-1 USTC ¶ 9317, 57 AFTR 2d 86-1120, cert den 478 US 1007, 92 L Ed 2d 715, 106 S Ct 3301 and (disagreed with by multiple cases as stated in *United States v General Dynamics Corp.* (CD Cal) 644 F Supp 1497, 33 CCF ¶ 75070, later proceeding (ASBCA) 87-1 BCA ¶ 19607 and revd (CA9 Cal) 813 F2d 1441, 34 CCF ¶ 75252, withdrawn, rereported, amd (CA9 Cal) 828 F2d 1356, 34 CCF ¶ 75364).

Under a criminal procedure rule providing that any defense, objection, or request which is

capable of determination without the trial of the general issue may be raised before trial by motion, a defense is "capable of determination" if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. *State v O'Boyle* (ND) 356 NW2d 122.

86. *State v Tanner* (La) 457 So 2d 1172. To the same effect, see *United States v Konefal* (ND NY) 566 F Supp 698.

87. *State v Aucoin* (Tenn Crim) 756 SW2d 705, cert den 489 US 1084, 103 L Ed 2d 845, 109 S Ct 1541, reh den 490 US 1077, 104 L Ed 2d 655, 109 S Ct 2092.

88. *Veloz v Rothwax*, 65 NY2d 902, 493 NYS2d 452, 483 NE2d 127.

89. *State v Perez*, 141 Ariz 459, 687 P2d 1214.

The court may grant an extension of time for the filing of pretrial motions where the circumstances warrant such extension. *United States v Chaverra-Cardona* (ND Ill) 667 F Supp 609, later proceeding (ND Ill) 669 F Supp 1443, later proceeding (ND Ill) 669 F Supp 1445, later proceeding (CA7 Ill) 879 F2d 1551, 28 Fed Rules Evid Serv 814, later proceeding (CA7 Ill) 885 F2d 354, 28 Fed Rules Evid Serv 623, habeas corpus proceeding (ND Ill) 1989 US Dist LEXIS 12882, supp op (ND Ill) 1989 US Dist LEXIS 13279 and post-conviction proceeding (ND Ill) 725 F Supp 1459.

90. *Commonwealth v Blackwell*, 312 Pa Super 117, 458 A2d 541.

for determining the time for a defendant to make a pretrial motion is the date of arraignment, not arrest.⁹¹

Under some rules of criminal procedure, a pretrial motion must be accompanied by an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion.⁹² There is no requirement that a defendant appear in court when pretrial motions are filed; defendant's presence is not even essential to the validity of the hearing of and ruling on the pretrial motions he filed.⁹³

On a pretrial motion in a criminal prosecution, the burden is upon defendant to place competent and convincing evidence before the court in support of his motion.⁹⁴ But rulings on pretrial motions in criminal cases need be based only on a fair preponderance of the evidence, not evidence beyond a reasonable doubt.⁹⁵ A motion by defendants in a criminal case to join in any and all pretrial and trial motions and requests for relief filed by any codefendant and to adopt the legal contentions incorporated therein, to the extent such motions are applicable to, and not inconsistent with the additional motions of, each defendant so moving, may be granted by the court in the interests of judicial economy and justice, to allow defendants to raise every feasible motion on their behalf, where there is no opposition to such motion by the prosecution.⁹⁶

■■■■ Observation: In some jurisdictions there is no statutory provision or other requirement of findings of fact and conclusions of law with regard to preliminary motions in criminal cases.⁹⁷

§ 93. —Uniform Rules of Criminal Procedure

With respect to pretrial motions generally, the Uniform Rules of Criminal Procedure provide that any defense, objection, or request capable of determination without trial of the general issue may be raised, and if raised before trial shall be raised by pretrial motion in accordance with Rule 451.⁹⁸ Except as to a motion for a pretrial judgment of acquittal, unless otherwise permitted by the court in the interest of justice: (1) all pretrial motions must be made by the time set by the court; and (2) a party making a pretrial motion shall make at the same time all other pretrial motions he intends to make for which grounds are then available.⁹⁹ Unless the court otherwise permits, all pretrial motions pending at the time set for hearing of a pretrial motion must be

91. *Commonwealth v Breslin*, 287 Pa Super 455, 430 A2d 692.

92. *Commonwealth v Burke*, 20 Mass App 489, 481 NE2d 494, review den 396 Mass 1101, 484 NE2d 102 (holding that unsigned document was not an affidavit within requirements set out in the rule).

93. *State v Snyder* (La App 4th Cir) 496 So 2d 1117, holding that trial judge's ruling that defendant in criminal case, by being "at large," had forfeited his right to file and have motions heard, and consequent decision not to conduct hearings on timely filed motions, were clearly wrong.

94. *State v Miller*, 321 NC 445, 364 SE2d 387.

95. *United States v Tucker* (ED NY) 495 F Supp 607.

96. *United States v Feola* (SD NY) 651 F Supp 1068 (disagreed with on other grounds by *Wabash Valley Power Asso. v Public Service Co.* (SD Ind) 678 F Supp 757, CCH Fed Secur L Rep ¶ 93724) and *affd without op* (CA2 NY) 875 F2d 857, cert den (US) 107 L Ed 2d 72, 110 S Ct 110.

97. *Sovey v State* (Tex App Houston (14th Dist)) 628 SW2d 163.

98. *Unif R Crim P* (1987) Rule 451(a).

99. *Unif R Crim P* (1987) Rule 451(b).

heard at the same time,¹ and a pretrial motion must be determined before trial unless the court, with consent of all parties or upon a finding that it would be impractical to determine the motion before trial, orders the determination deferred until trial of the general issue or until after verdict.² If the court grants a motion based on a defect in the institution of the prosecution or in the information or indictment, it may order that the defendant be held in custody or that his terms or conditions of release be continued for a specified time pending the filing of a new information or indictment. This rule does not affect the provisions of any statute relating to periods of limitations.³

Unless otherwise ordered by the court for cause shown, a party may assert the following only in a pretrial motion made in conformity with subdivision (b): (1) defenses and objections based on defects in the institution of the prosecution, other than the lack of jurisdiction of the court over the person or subject matter which can be raised at any time; (2) defenses and objections based on defects in the information or indictment; (3) requests regarding discovery; (4) requests that potential testimony or other evidence should be suppressed; (5) requests for transfer of prosecution; (6) requests for joinder, dismissal, or severance; and (7) requests for bifurcation of mental nonresponsibility issues.⁴

2. MOTION IN LIMINE PRACTICE [§§ 94-114]

a. IN GENERAL [§§ 94-103]

§ 94. Definition, nature and purpose of motion in limine

A motion in limine is a preliminary or pretrial⁵ procedural⁶ device. The term "in limine" is a Latin phrase which may be translated "on the threshold" or "at the outset."⁷ Broadly defined, it would apply to any motion made prior to the impaneling of the jury. A motion in limine seeks a protective order⁸ prohibiting the opposing party, counsel and witnesses from offering offending evidence at trial, or even mentioning it at trial, without first having its admissibility determined outside the presence of the jury.⁹ The motion affords

1. Unif R Crim P (1987) Rule 451(d).

2. Unif R Crim P (1987) Rule 451(e).

3. Unif R Crim P (1987) Rule 451(f).

4. Unif R Crim P (1987) Rule 451(c).

5. *State v Tate*, 300 NC 180, 265 SE2d 223; *Braden v Hendricks* (Okla) 695 P2d 1343, CCH Prod Liab Rep ¶ 10394.

A motion in limine merely presents an issue of admissibility of evidence which is likely to arise at trial, in a pretrial setting. *Romanek-Golub & Co. v Anvan Hotel Corp.* (1st Dist) 168 Ill App 3d 1031, 119 Ill Dec 482, 522 NE2d 1341.

For the historical background of the motion, see *United States v Brodhead* (DC Mass) 714 F Supp 593, and 20 Am Jur Trials 441, Motion in Limine Practice § 3.

6. *State v Miura*, 6 Hawaii App 501, 730 P2d

917; *State v Halsey*, 232 Neb 658, 441 NW2d 877; *Shark v Thompson* (ND) 373 NW2d 859.

7. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656; *State v Tate*, 300 NC 180, 265 SE2d 223.

8. A motion for a protective order is similar to a motion in limine. See *Reveal v West* (Tex App Houston (1st Dist)) 764 SW2d 8.

9. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656. To the same effect, see *Walton v Datry*, 185 Ga App 88, 363 SE2d 295; *State v Miura*, 6 Hawaii App 501, 730 P2d 917; *Lundell v Citrano* (1st Dist) 129 Ill App 3d 390, 84 Ill Dec 581, 472 NE2d 541; *Prout v State*, 311 Md 348, 535 A2d 445; *State v Lundy* (Hamilton Co) 41 Ohio App 3d 163, 535 NE2d 664, motion overr; *Messler v Simmons Gun Specialties, Inc. (Okla)* 687 P2d 121, CCH Prod Liab Rep ¶ 10105.

Annotations: Modern status of rules as to use of motion in limine or similar preliminary

an opportunity to the court to rule on the admissibility of evidence in advance, and prevents encumbering the record with immaterial or prejudicial matter,¹⁰ as well as providing a means of ensuring that privileged material as to which discovery has been allowed by the court will not be used at trial if it is found to be inadmissible.¹¹ It recognizes that the mere asking of an improper question in the hearing of the jury may prove so prejudicial that, notwithstanding an instruction by the court to disregard the offensive matter, the moving party will be denied his right to a fair trial. It is the prejudicial effect of the questions asked or statements made in connection with the offer of evidence, and not so much the prejudicial effect of the evidence itself, that this very practical tool was designed to reach.¹² Thus, the real purpose of a motion in limine is to give the trial judge notice of the movant's position so as to avoid the introduction of damaging evidence which may irretrievably infect the fairness of the trial.¹³ As one court has stated, because a motion in limine shortens trial, simplifies issues, and reduces the possibility of mistrial, its function is not unlike the pretrial conference, and it may accomplish similar ends.¹⁴ However, it is not the office or function of a motion in limine to obtain a final ruling upon the ultimate admissibility of evidence;¹⁵ the court's ruling on the motion is interlocutory in nature and subject to change during the

motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311.

Law Reviews: Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 Stan L Rev 1271 (1987).

Practice References: 20 Am Jur Trials 441, Motion in Limine Practice §§ 1-4.

Bailey & Rothblatt, *Successful Techniques for Criminal Trials* (2d ed, 1985), §§ 4:10 et seq.; Carlson, *Successful Techniques for Civil Trial* (1983), Ch 1; Charfoos & Christensen, *Personal Injury Practice: Technique and Technology* (1986) § 16:8; Swartz & Swartz, *Handbook of Personal Injury Forms & Litigation* (1982), §§ 6:14 et seq.

10. *Messler v Simmons Gun Specialties, Inc.* (Okla) 687 P2d 121, CCH Prod Liab Rep ¶ 10105.

The purpose of a motion in limine is to exclude irrelevant and immaterial matters, or to exclude evidence when its probative value is outweighed by the danger of unfair prejudice. *Devoe v Western Auto Supply Co.* (Fla App D2) 537 So 2d 188, 14 FLW 250.

In criminal cases, the use of in limine motions is encouraged to exclude collateral or extraneous matters. *People v Downey* (2d Dist) 162 Ill App 3d 322, 113 Ill Dec 553, 515 NE2d 362, app den 119 Ill 2d 563, 119 Ill Dec 390, 522 NE2d 1249, post-conviction proceeding (2d Dist) 198 Ill App 3d 704, 144 Ill Dec 833, 556 NE2d 300, app den (Ill) 149 Ill Dec 327, 561 NE2d 697.

Typically, a motion in limine is a motion

made before or during a jury trial outside of the hearing of the jury, the purpose of which is to prevent the jury from hearing certain questions and statements that are allegedly prejudicial to the movant. *Prout v State*, 311 Md 348, 535 A2d 445.

A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. *State v Halsey*, 232 Neb 658, 441 NW2d 877; *Frerichs v Nebraska Harvestore Systems, Inc.*, 226 Neb 220, 410 NW2d 487, 4 UCCRS2d 763.

11. *Canfield v Sandock* (Ind App) 521 NE2d 704, later proceeding (Ind App) 546 NE2d 1237, superseded (Ind) 563 NE2d 1279 and vacated (Ind) 563 NE2d 526.

12. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

The purpose of the motion is to avoid the unfairness caused by the presentation of objectionable and unduly prejudicial evidence to the jury and the obviously futile attempt to unring the bell. *Peat, Marwick, Mitchell & Co. v Superior Court* (1st Dist) 200 Cal App 3d 272, 245 Cal Rptr 873, mod on other grounds (Cal App 1st Dist) slip op and cert dismd 490 US 1086, 104 L Ed 2d 673, 109 S Ct 2114; *Clemens v American Warranty Corp.* (2nd Dist) 193 Cal App 3d 444, 238 Cal Rptr 339.

13. *Prout v State*, 311 Md 348, 535 A2d 445.

14. *Good v A.B. Chance Co.*, 39 Colo App 70, 565 P2d 217.

15. *Remsen v State* (Ind) 495 NE2d 184; *State v Halsey*, 232 Neb 658, 441 NW2d 877.

course of trial.¹⁶

Observation: A motion in limine does not result in a severance of the subject of the motion yielding separate trials; it merely precludes reference to the subject without first obtaining a ruling on admissibility outside the presence of the jury.¹⁷

§ 95. Distinguished from motion to suppress

While the motion in limine resembles the more familiar motion to suppress, there is an important distinction: the motion to suppress asserts that items of evidence or confessions were illegally obtained and is grounded in constitutional right, mandating that an evidentiary hearing be held,¹⁸ while the motion in limine requests only a ruling that the characteristics of a particular piece of evidence give it potentially inflammatory aspects which appear to outweigh whatever materiality it could have at trial, and is addressed to the discretion of the trial judge.¹⁹

Nevertheless, some courts have recognized that a motion in limine may also be used as the equivalent of a motion to suppress evidence which is either incompetent or improper because of some unusual circumstances.²⁰ And it has been noted in at least one jurisdiction that although motions to suppress are generally labeled motions in limine in civil practice, motions to suppress are proper in civil cases, and that when evidence is suppressed in a civil case, it may not be used in the trial unless the order is vacated or set aside.²¹ By the same token, a motion in limine is appropriate in criminal cases as well as in civil cases.²²

Caution: The distinction between the two motions would, of course, be of critical importance in a jurisdiction which recognizes one but not the other.²³

16. § 112.

17. *CLS Associates, Ltd. v A B* (Tex App Dallas) 762 SW2d 221.

18. *Sapp v State*, 184 Ga App 527, 362 SE2d 406, later app 188 Ga App 700, 374 SE2d 114.

19. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

Generally as to the trial court's discretion, see § 97.

Practice References: 20 Am Jur Trials 441, Motion in Limine Practice § 7; Bailey & Rothblatt, *Successful Techniques for Criminal Trials* (2d ed, 1985), § 4:10.

20. *Riverside Methodist Hospital Assn. v Guthrie* (Franklin Co) 3 Ohio App 3d 308, 3 Ohio BR 355, 444 NE2d 1358, noting, however, that the motion in limine is frequently misused and misunderstood and that part of the confusion arises from the two different purposes it can serve.

21. *Rolling Meadows v Kohlberg* (1st Dist) 83 Ill App 3d 10, 38 Ill Dec 586, 403 NE2d 1040.

22. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

See also *Smith v State*, 185 Ga App 531, 364 SE2d 907, stating that although a motion to suppress is not a proper procedural device for challenging the admissibility of a blood-alcohol test based on noncompliance with an agency regulation governing the administration of the test, the trial court would be authorized to reach the merits of a motion to suppress predicated on such grounds by treating it as a motion in limine. To the same effect, see *State v Mallory*, 180 Ga App 815, 350 SE2d 823.

23. Distinguishing between a motion to suppress evidence, which was not recognized in the state, and the motion filed in the instant case, the court in *Scarborough v State*, 171 Tex Crim 83, 344 SW2d 886, held that the trial judge in a murder prosecution had properly sustained a state's motion requesting the court to instruct the defense counsel not to ask questions of a state's witness with reference to any indictment pending against the witness in federal court involving income tax evasion nor to allude to that indictment in the presence of jury without such questions having first been determined to be relevant and admissible by the court outside the presence and hearing of

§ 96. Recognition or disapproval of practice

A growing number of jurisdictions now support the view, either expressly or implicitly, that a trial judge may grant a preliminary motion to secure the exclusion of anticipated prejudicial matters at trial,²⁴ at least if the order does not necessarily represent a final and irrevocable trial court determination on the question of admission of the particular evidence.²⁵ However, a few courts have indicated disapproval of the practice of making such motions, insofar as they call for advance rulings on the admissibility of evidence.²⁶

the jury. Affirming the murder conviction, the court rejected a contention that the defendant had been denied the right to offer admissible evidence before the jury and further held that the trial judge's action on the motion had not been, as contended by the defendant, tantamount to the granting of a motion to suppress evidence.

24. *Crimm v Missouri P.R. Co.* (CA8 Mo) 750 F2d 703, 36 BNA FEP Cas 883, 35 CCH EPD ¶ 34824, 17 Fed Rules Evid Serv 495, 40 FR Serv 2d 1059; *May v Interstate Moving & Storage Co.* (CA10 Colo) 739 F2d 521; *Re Japanese Electronic Products Antitrust Litigation* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, rev'd on other grounds 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (disagreed with on other grounds by Pfeiffer v Marion Center Area School Dist., Bd. of School Directors etc. (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675); *United States v Costa* (CA2 NY) 425 F2d 950, cert den 398 US 938, 26 L Ed 2d 272, 90 S Ct 1843; *Pacelli v Nassau County Police Dept.* (ED NY) 639 F Supp 1382, 21 Fed Rules Evid Serv 1004; *Hunter v Blair* (1987, SD Ohio) 120 FRD 667; *Ex parte Houston County* (Ala) 435 So 2d 1268; *Gordon v State* (Alaska) 501 P2d 772; *State ex rel. Berger v Superior Court of County of Maricopa*, 108 Ariz 396, 499 P2d 152; *People v Laiwa*, 34 Cal 3d 711, 195 Cal Rptr 503, 669 P2d 1278 (superseded by statute on other grounds as stated in *People v Trujillo* (6th Dist) 217 Cal App 3d 1219, 266 Cal Rptr 473, review den); *Giordano v Ramirez* (Fla App D3) 503 So 2d 947, 12 FLW 670; *Rivers v State*, 250 Ga 288, 298 SE2d 10; *State v Doyle*, 64 Hawaii 229, 638 P2d 332; *Burris v Madison County* (5th Dist) 154 Ill App 3d 1064, 107 Ill Dec 898, 507 NE2d 1267; *Gasaway v State*, 249 Ind 241, 231 NE2d 513; *Gaines v State* (Ind App) 456 NE2d 1058; *State v Guess* (Iowa) 223 NW2d 214; *Douglas v Lombardino*, 236 Kan 471, 693 P2d 1138; *Gendron v Pawtucket Mut. Ins. Co.* (Me) 409 A2d 656; *Green v State*, 35 Md App 510, 371 A2d 1112, cert gr 280 Md 731 and rev'd on other grounds 281 Md 483,

380 A2d 43; *Commonwealth v Hood*, 389 Mass 581, 452 NE2d 188; *Lapasinskas v Quick*, 17 Mich App 733, 170 NW2d 318; *Henry v State* (Miss) 198 So 2d 213, reinstated (Miss) 202 So 2d 40, cert den 392 US 931, 20 L Ed 2d 1389, 88 S Ct 2276; *State v Hawthorne*, 49 NJ 130, 228 A2d 682 (ovrld on other grounds by *State v Sands*, 76 NJ 127, 386 A2d 378); *Hall v Hotel L'Europe, Inc.*, 69 NC App 664, 318 SE2d 99, 117 BNA LRRM 3193; *Hammond v Moon* (Franklin Co) 8 Ohio App 3d 66, 8 Ohio BR 97, 455 NE2d 1301; *Messler v Simmons Gun Specialties, Inc.* (Okla) 687 P2d 121, CCH Prod Liab Rep ¶ 10105; *Commonwealth v Berkheimer*, 501 Pa 85, 460 A2d 233, later app 505 Pa 506, 481 A2d 851; *State v Cruz* (RI) 517 A2d 237; *Bridges v Richardson*, 163 Tex 292, 354 SW2d 366; *Montes v Lazzara Shipyard* (Tex App Corpus Christi) 657 SW2d 886; *Hayes v State* (Wyo) 599 P2d 558.

Despite being a relatively recent phenomenon, the motion in limine has attained widespread acceptance in state and federal courts. *Davidson v Beco Corp.*, 112 Idaho 560, 733 P2d 781, aff'd 114 Idaho 107, 753 P2d 1253, later app (App) 116 Idaho 696, 778 P2d 818.

Annotations: Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311 § 3[a], [c].

25. *State ex rel. Berger v Superior Court of County of Maricopa*, 108 Ariz 396, 499 P2d 152; *Twiford v Weber* (Iowa) 220 NW2d 919; *Rich v Quinn* (Warren Co) 13 Ohio App 3d 102, 13 Ohio BR 119, 468 NE2d 365; *Bowman v State* (Okla Crim) 585 P2d 1373, cert den 440 US 920, 59 L Ed 2d 471, 99 S Ct 1243, post-conviction proceeding (Okla Crim) 789 P2d 631; *State v Fernandes* (RI) 526 A2d 495; *Scarborough v State*, 171 Tex Crim 83, 344 SW2d 886; *Jordan v Berkey*, 26 Wash App 242, 611 P2d 1382.

As to the types of orders, see § 101.

Annotations: 63 ALR3d 311 § 3[d].

26. *Robertson v White* (WD Ark) 113 FRD 20; *State v Alaska Continental Development Corp.* (Alaska) 630 P2d 977; *State v Flett*, 234 Or 124, 380 P2d 634, 94 ALR2d 1082; *Bosley v*

■■■■ *Practice guide:* It has been stated that specific statutes are not required to authorize a motion in limine, because of the court's inherent power to pass on the admissibility of evidence.²⁷

§ 97. —Inherent power and discretion of court

Some courts have indicated that a trial court's authority to entertain motions in limine emanates from its inherent power to admit or exclude evidence,²⁸ even where there is no express authorization by statute or court rule,²⁹ and the view has been taken that entertaining a pretrial motion to exclude prejudicial evidence is within the trial court's discretion,³⁰ and the court's ruling in this regard will be reversed only in the event of an abuse of such discretion.³¹

§ 98. Advantages and disadvantages of motion

The advantages of motion in limine practice are significant and persuasive. The pretrial consideration of prejudicial evidence problems will speed, simplify, and purify the process of obtaining just verdicts and will decrease the opportunities for committing reversible error, which might require the trial court to declare a mistrial or the appellate court to order a new trial. Perhaps more importantly, the pretrial ruling replaces the ineffective, unrealistic, and psychologically invalid admonitions to the jury. Another attribute of the motion is its availability to both sides of the case. However, the practice of employing motions in limine is not without drawbacks. For example, it can be

State (Tex Crim) 414 SW2d 468, cert den 389 US 876, 19 L Ed 2d 162, 88 S Ct 172.

Annotations: 63 ALR3d 311 § 3[b],[c].

27. Good v A.B. Chance Co., 39 Colo App 70, 565 P2d 217.

Practice References: For a jurisdictional survey of motion in limine practice with representative cases on a state-by-state basis, see Carlson, *Successful Techniques for Civil Trial* (1983), §§ 1:10 et seq.

28. Peat, Marwick, Mitchell & Co. v Superior Court (1st Dist) 200 Cal App 3d 272, 245 Cal Rptr 873, mod on other grounds (Cal App 1st Dist) slip op and cert dismd 490 US 1086, 104 L Ed 2d 673, 109 S Ct 2114; Evans v Sisters of Third Order of St. Francis (3d Dist) 154 Ill App 3d 137, 107 Ill Dec 74, 506 NE2d 965, app den (Ill) 113 Ill Dec 297, 515 NE2d 106; Burrus v Silhavy, 155 Ind App 558, 293 NE2d 794, 63 ALR3d 304; Rich v Quinn (Warren Co) 13 Ohio App 3d 102, 13 Ohio BR 119, 468 NE2d 365; Messler v Simmons Gun Specialties, Inc. (Okla) 687 P2d 121, CCH Prod Liab Rep ¶ 10105.

Trial court has absolute right to refuse to decide admissibility of evidence allegedly violative of some ordinary rule of evidence, prior to trial. Locke v Vonalt, 189 Ga App 783, 377 SE2d 696.

29. Peat, Marwick, Mitchell & Co. v Superior Court (1st Dist) 200 Cal App 3d 272, 245 Cal Rptr 873, mod on other grounds (Cal App 1st Dist) slip op and cert dismd 490 US 1086, 104

L Ed 2d 673, 109 S Ct 2114; Good v A. B. Chance Co., 39 Colo App 70, 565 P2d 217; Department of Public Works & Bldgs. v Roehrig (5th Dist) 45 Ill App 3d 189, 3 Ill Dec 893, 359 NE2d 752; Rich v Quinn (Warren Co) 13 Ohio App 3d 102, 13 Ohio BR 119, 468 NE2d 365.

30. Hendrix v Raybestos-Manhattan, Inc. (CA11 Ga) 776 F2d 1492, CCH Prod Liab Rep ¶ 10890, 19 Fed Rules Evid Serv 903, 3 FR Serv 3d 1169; United States v Vest (DC Mass) 639 F Supp 899, affd (CA1 Mass) 813 F2d 477, later proceeding (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489 and (disagreed with by multiple cases as stated in United States v Hurst (CMA) 29 MJ 477, 29 Fed Rules Evid Serv 1252); State v Askew (Ala App) 455 So 2d 36; Moore v Bellamy (5th Dist) 183 Ill App 3d 110, 131 Ill Dec 658, 538 NE2d 1214; State v Garrett (Iowa) 183 NW2d 652; Russell v Lake Sherwood Acres, Inc. (La App 1st Cir) 388 So 2d 822; O'Keeffe v Snyder, 83 NJ 478, 416 A2d 862; Peed v Peed, 72 NC App 549, 325 SE2d 275, cert den 313 NC 604, 330 SE2d 612; Rich v Quinn (Warren Co) 13 Ohio App 3d 102, 13 Ohio BR 119, 468 NE2d 365; Gammon v Clark Equipment Co., 38 Wash App 274, 686 P2d 1102, affd, remanded, en banc 104 Wash 2d 613, 707 P2d 685.

31. People v McCoy (1st Dist) 156 Ill App 3d 194, 108 Ill Dec 871, 509 NE2d 567; Equitable Life Leasing Corp. v Cedarbrook, Inc., 52 Wash App 497, 761 P2d 77.

argued that the trial becomes more "piecemeal" because of an increase in the number of separate issues being considered at different times, that this may lead to an increase in the overall time required to try the case, that an "absolute" motion in limine creates automatic error and may increase the number of new trials ordered on appeal, and that indiscriminate use of the technique could damage counsel's case by suggesting proof that opposing counsel had not considered.³²

Because the motion in limine may be utilized not only to preclude prejudicial evidence from being introduced at the trial, but also in other ways to narrow the issues, shorten the trial, and save costs for the litigants, it has been said that many courts will encourage the use of motions in limine whenever appropriate.³³ And in criminal cases defense counsel and prosecutors are being encouraged to bring motions prohibiting use of certain evidence in advance of trial to enable the trial court to exercise its discretion to grant or deny such motions under less hectic and more thoughtful circumstances.³⁴

§ 99. Applicability of practice, and limitations thereon

The ability to restrict interrogation at trial makes the in limine order a powerful weapon, but this power also makes it a potentially dangerous one,³⁵ as in politically sensitive criminal trials, where the government's use of the in limine practice may jeopardize the accused's right to a fair trial.³⁶ Consequently, before granting a motion in limine, courts must be certain that such

32. Practice References: 20 Am Jur Trials 441, Motion in Limine Practice §§ 8, 9; Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 16:8.

One of the purposes of the motion in limine is to foster judicial economy by shortening trial and simplifying issues where possible. *Oliver v Hayes International Corp.* (Ala App) 456 So 2d 802.

Litigators have discovered that whenever an advance ruling on admissibility can be obtained, it not only spares them the expense of bringing to the courthouse witnesses and rebuttal witnesses, but it also affords them a basis for decisions of trial strategy. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656, noting that perhaps once an evidentiary issue is decided so far as the trial court is concerned, it enhances the prospects for compromise settlement, and that perhaps also when the moving party does not succeed in gaining in advance of trial the order which he seeks, he may have educated the trial judge on the evidentiary problem and thereby enhanced his prospects of a favorable ruling at trial.

See also *Davidson v Beco Corp.*, 112 Idaho 560, 733 P2d 781, aff'd 114 Idaho 107, 753 P2d 1253, later app (App) 116 Idaho 696, 778 P2d 818, noting that the trial court's ruling on the motion in limine enables counsel on both sides to make strategic decisions before trial concerning the content and order of evidence to be presented.

Law Reviews: Blumenkopf, The motion in limine: an effective procedural device with no material downside risk, 16 N Eng L Rev (no. 2) 171 (March 1981).

Davis, Motions in limine: tools for a fair trial, 18 Trial 90 (Nov. 1982).

Epstein, Motions in limine—a primer, 8 Litigation 34 (Spring 1982).

Colbert, The motion in limine in politically sensitive cases: silencing the defendant at trial, 39 Stan L Rev 1271 (1987).

33. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

The use of motions in limine is to be encouraged so as to reduce trial errors resulting in mistrials, new trials, and reversals. *Evans v Sisters of Third Order of St. Francis* (3d Dist) 154 Ill App 3d 137, 107 Ill Dec 74, 506 NE2d 965, app den (Ill) 113 Ill Dec 297, 515 NE2d 106.

34. *People v Shrader*, 88 Mich App 680, 279 NW2d 47.

35. *Lockett v Bi-State Transit Authority*, 94 Ill 2d 66, 67 Ill Dec 830, 445 NE2d 310; *Reidberger v Highland Body Shop, Inc.*, 83 Ill 2d 545, 48 Ill Dec 237, 416 NE2d 268.

36. Law Reviews: Colbert, The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial, 39 Stan L Rev 1271 (1987).

action will not unduly restrict the opposing party's presentation of its case.³⁷ An order in limine should only be used as a shield and never to gag the truth and permit other evidence to mislead the jury because the order prevents such evidence from being rebutted.³⁸ And it should not ordinarily be employed to choke off an entire claim or defense,³⁹ particularly in a criminal case.⁴⁰ It is clearly improper for the court to allow a motion in limine which limits or refuses the introduction of relevant admissible evidence.⁴¹

Since the motion prevents a party from presenting his evidence in the usual way, its use should be exceptional rather than general,⁴² or at least selective.⁴³ The motion should be used, if at all, as a rifle and not as a shotgun,⁴⁴ with counsel pointing out the objectionable material and showing why the material is inadmissible and prejudicial. Since no one knows exactly how the trial will proceed, trial courts would ordinarily be well advised to require an evidentiary hearing on the motion when its validity or invalidity is not manifest from the face of the motion.⁴⁵

The use of motions in limine to summarily dismiss a portion of a claim has been condemned, and trial courts are cautioned not to allow motions in limine to be used as unwritten and unnoticed motions for summary judgment or motions to dismiss.⁴⁶ Nor should the motion be used to perform the function

37. *Reidelberger v Highland Body Shop, Inc.*, 83 Ill 2d 545, 48 Ill Dec 237, 416 NE2d 268; *Burris v Madison County* (5th Dist) 154 Ill App 3d 1064, 107 Ill Dec 898, 507 NE2d 1267; *People v Lindsey* (5th Dist) 148 Ill App 3d 751, 102 Ill Dec 158, 499 NE2d 715; *Whitley v Meridian* (Miss) 530 So 2d 1341.

A party has no right to utilize the in limine procedure to hamper the opponent's presentation of relevant admissible evidence. *Lundell v Citrano* (1st Dist) 129 Ill App 3d 390, 84 Ill Dec 581, 472 NE2d 541.

38. *Iowa Nat. Mut. Ins. Co. v Worthy* (Fla App D5) 447 So 2d 998.

39. *Madison Associates v Bass* (1st Dist) 158 Ill App 3d 526, 110 Ill Dec 513, 511 NE2d 690; *Bradley v Caterpillar Tractor Co.* (5th Dist) 75 Ill App 3d 890, 31 Ill Dec 623, 394 NE2d 825 (overly broad in limine orders unduly restricted defense); *Lewis v Buena Vista Mut. Ins. Asso.* (Iowa) 183 NW2d 198.

An in limine order which precludes the opponent from presenting a valid defense is an abuse of discretion by the court. *Duffy v Midlothian Country Club* (1st Dist) 135 Ill App 3d 429, 90 Ill Dec 237, 481 NE2d 1037.

40. *State v Quick*, 226 Kan 308, 597 P2d 1108, later app 229 Kan 117, 621 P2d 997 and (diverged from on other grounds by *State v Jackson*, 244 Kan 621, 772 P2d 747), holding that, in trial for robbery, trial court erred in granting prosecution's motion in limine restricting defendant from offering admissible evidence concerning alibi and alleged misidentification of defendant.

41. *Mack v First Secur. Bank* (1st Dist) 158 Ill App 3d 497, 110 Ill Dec 537, 511 NE2d 714, app den 117 Ill 2d 545, 115 Ill Dec 401, 517 NE2d 1087.

42. *Bradley v Caterpillar Tractor Co.* (5th Dist) 75 Ill App 3d 890, 31 Ill Dec 623, 394 NE2d 825; *Lewis v Buena Vista Mut. Ins. Asso.* (Iowa) 183 NW2d 198; *Ory v Libersky*, 40 Md App 151, 389 A2d 922.

43. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

Requests for rulings on motions in limine should be granted only sparingly and with the same caution as requests for dismissals on opening statements. *Bellardini v Krikorian*, 222 NJ Super 457, 537 A2d 700.

44. *Lewis v Buena Vista Mut. Ins. Asso.* (Iowa) 183 NW2d 198; *State v Dubois*, 150 Vt 600, 556 A2d 86.

For an example of a shotgun approach by defendants, who submitted a motion in limine with 14 paragraphs, which plaintiffs answered with a shotgun defense consisting of 527 exhibits, see *Frerichs v Nebraska Harvestore Systems, Inc.*, 226 Neb 220, 410 NW2d 487, 4 UCCRS2d 763. The trial court informed the parties that the disposition of defendants' motion was not to be controlled by "a mini trial of the issues," and the court rejected plaintiffs' 527 exhibits.

45. *Bradley v Caterpillar Tractor Co.* (5th Dist) 75 Ill App 3d 890, 31 Ill Dec 623, 394 NE2d 825; *Lewis v Buena Vista Mut. Ins. Asso.* (Iowa) 183 NW2d 198.

46. *Rice v Kelly* (Fla App D4) 483 So 2d 559,

of a directed verdict.⁴⁷ Motions in limine are not to be used as a sweeping means of testing issues of law.⁴⁸ And deficiencies in pleadings or evidence are not appropriately resolved by a motion in limine.⁴⁹ Clearly, a motion in limine cannot properly be used as a vehicle to circumvent the requirements of rules of procedure.⁵⁰

On the other hand, the constitutional right of an accused to a fair trial is not diminished if the defendant is precluded from raising defenses for which the defendant can present no supporting evidence at all.⁵¹

§ 100. —Use in nonjury case

Use of a motion in limine to exclude evidence in a case tried by the court without a jury has been disapproved on the grounds that it can serve no useful purpose in a nonjury case.⁵² But, while the granting of such a motion in a bench trial is error, it is not reversible error,⁵³ unless the complaining party can show both an erroneous ruling and prejudice resulting therefrom.⁵⁴ It has also been held that even if an in limine motion is inappropriate because trial was to the court, consideration of the merits of the motion is not precluded simply by virtue of its caption.⁵⁵

§ 101. Types of motions

If the trial judge is persuaded that a ruling should be made before the jury is impaneled, his order may take either of two forms: (a) The order may be an

11 FLW 535; *Dailey v Multicon Dev., Inc.* (Fla App D4) 417 So 2d 1106.

See also *Buy-Low Save Centers, Inc. v Glinert* (Fla App D4) 547 So 2d 1283, 14 FLW 2026, holding that the trial court's grant of a motion in limine was tantamount to an improper summary judgment on the issue of how damages were to be calculated; *Krejci v Halak* (Cuyahoga Co) 34 Ohio App 3d 1, 516 NE2d 235, holding that the trial court could not use the motion to dismiss portions of the complaint in the belief that they would merely "muddy the waters" of an already complex trial.

47. *Buck's Service Station, Inc. v DOT*, 191 Ga App 341, 381 SE2d 516, affd 259 Ga 825, 387 SE2d 877; *Ory v Libersky*, 40 Md App 151, 389 A2d 922.

48. *Schichtl v Slack*, 293 Ark 281, 737 SW2d 628.

49. *Buck's Service Station, Inc. v DOT*, 191 Ga App 341, 381 SE2d 516, affd 259 Ga 825, 387 SE2d 877; *Mathis v Bill De La Garza & Associates, P.C.* (Tex App Texarkana) 778 SW2d 105, reh overr (Tex App Texarkana) 1989 Tex App LEXIS 2706.

However, see *Clemens v American Warranty Corp.* (2nd Dist) 193 Cal App 3d 444, 238 Cal Rptr 339, where the court noted that the motions in limine in that case were, in net effect, an "objection to all evidence" on the grounds that plaintiff failed to state any cause of action as to defendants, and held that following the

sustaining of such objection a separate motion for judgment on the pleadings was not essential, and an objection to all evidence which is sustained could be followed by a judgment in favor of the objecting party.

50. *Krejci v Halak* (Cuyahoga Co) 34 Ohio App 3d 1, 516 NE2d 235.

51. *United States v Brodhead* (DC Mass) 714 F Supp 593.

52. *Shark v Thompson* (ND) 373 NW2d 859.

A motion in limine has no place in a court trial; its use is limited to the jury trial. *Capitol Neon Signs, Inc. v Indiana Nat. Bank* (Ind App) 501 NE2d 1082.

Contra, see *Pepper v Marks* (1st Dist) 168 Ill App 3d 253, 119 Ill Dec 26, 522 NE2d 688, wherein the court stated: "While we acknowledge the increased value of motions in limine in a jury trial, nothing cited by plaintiff supports his argument that the trial court in a bench trial cannot make use of a motion in limine to exclude inadmissible evidence."

53. Where evidence was properly excluded on grounds of relevance in case tried without jury, court's erroneous use of motion in limine to exclude evidence was not reversible error. *Shark v Thompson* (ND) 373 NW2d 859.

54. *Beta Alpha Shelter of Delta Tau Delta Fraternity v Strain* (Ind App) 446 NE2d 626.

55. *Colorado Land & Resources, Inc. v Credit-thrift of America, Inc.* (Colo App) 778 P2d 320.

"absolute prohibitive" one, directing the opposing party to neither offer the challenged evidence or even to mention it in the presence of the jury; (b) The order may be a "preliminary prohibitive" one, directing the opposing party to neither offer the challenged evidence nor even to mention it in the presence of the jury unless and until during trial out of the hearing of the jury he obtains a ruling on the admissibility of the challenged evidence. By that point in the trial it is anticipated the trial judge will have sufficient legal and factual information before him to make a final ruling.⁵⁶ Thus, when a trial judge makes a clear nontentative ruling on an issue raised by a motion in limine, the moving party is entitled to rely upon that ruling.⁵⁷

In contrast to the "prohibitive" motion, which seeks a judicial declaration that certain evidence expected to be offered by an adversary is inadmissible, the "permissive" motion is made by the party proposing to offer sensitive evidence and seeking a pretrial determination that the evidence is admissible under the circumstances of the case.⁵⁸

§ 102. Possible matters to be excluded; civil cases

Use of the motion in limine has developed quite extensively in the field of civil practice, limited, apparently, only by the imagination of counsel.⁵⁹ In general, a motion in limine may be used in civil cases to seek a ruling on the competency of certain evidence; to determine the elements of damages in a given case; to gain a ruling excluding evidence which is irrelevant; to determine the admissibility of evidence of subsequent remedial measures; to ascertain whether evidence of statements made during compromise negotiations may be admitted; or to test the admissibility of statements against interest.⁶⁰

56. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

An order granting a motion in limine was not absolute and the nonmoving party might offer the disputed evidence at trial, where the order appeared to be preliminary in that it ended with the words "without further order of this court." *Ex parte Houston County (Ala)* 435 So 2d 1268.

For an example of a preliminary prohibitive order, see *Nelson v Trinity Medical Center (ND)* 419 NW2d 886, where the trial court stated that neither party was to refer to a certain fact but that this was not an absolute ban because that could change during the trial, and that when either party felt it might be appropriate to bring up the matter they should take a break and discuss it out of the presence of the jury.

Practice References: *Bailey & Rothblatt, Successful Techniques for Criminal Trials* (2d ed, 1985), §§ 4:13 et seq.

Forms: Sample forms of motion in limine; "absolute-prohibitive" and "preliminary prohibitive." 20 Am Jur Trials 441, Motion in Limine Practice §§ 63, 64.

Bailey & Rothblatt, Successful Techniques for Criminal Trials (2d ed, 1985), §§ 4:29, 4:30.

57. *Adler v Ryder Truck Rental, Inc.*, 53 Wash App 33, 765 P2d 910, 4 BNA IER Cas 1500, 115 CCH LC ¶ 56246, review den 112 Wash 2d 1013, rejecting defendant's contention that the court's ruling in limine is advisory and tentative until an objection is timely made in the course of trial and the predicate for the ruling is no longer hypothetical.

58. Practice References: 20 Am Jur Trials 441, Motion in Limine Practice § 6.

Forms: Sample form of "permissive" motion in limine; alternative relief requested. 20 Am Jur Trials 441, Motion in Limine Practice § 65.

Bailey & Rothblatt, Successful Techniques for Criminal Trials (2d ed, 1985), § 4:31.

59. Practice References: 20 Am Jur Trials 441, Motion in Limine Practice §§ 10-37.

Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986) § 16:8.

60. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

In action against newspaper for publishing article which invaded plaintiff's privacy and portrayed her in false light, court did not err in

More specifically, case authority indicates that a motion may seek to exclude the introduction of evidence regarding the following types of issues:

- Privileged matters⁶¹
- Specific matters affecting liability—⁶²
 - Use of alcohol or drugs⁶³
 - Adverse reactions from drug at issue which occurred after plaintiff's alleged reaction⁶⁴
 - Post-accident repairs⁶⁵
 - Contributory negligence and assumption of risk⁶⁶
 - Violation of statutes, codes, ordinances, or the like⁶⁷
 - Existence and misuse of trade secrets⁶⁸
- Marital status or other family relationships or circumstances⁶⁹
- Other pending cases⁷⁰
- Matters adversely affecting the credibility or character of a party⁷¹
- Matters affecting damages⁷²

granting defendant's motion in limine to bar plaintiff from introducing another article that appeared in a different newspaper, where article did not tend to make existence of facts that were of consequence to determination of action more or less probable, and where article was potentially prejudicial. *Rinehart v Toledo Blade Co.* (Hancock Co) 21 Ohio App 3d 274, 21 Ohio BR 345, 487 NE2d 920, motion dismd.

61. *Lundell v Citrano* (1st Dist) 129 Ill App 3d 390, 84 Ill Dec 581, 472 NE2d 541.

62. In personal injury action involving garbage refuse bin, trial court erred in excluding evidence on motion in limine that defendant had received notice of potential nature of such refuse bins, which ruling prevented use of notice to impeach city engineer's testimony in presence of jury that no such notice had been received, where engineer had testified in absence of jury to having read such notice, in that use of excluded evidence allowed false premise to be projected to jury. *Whittley v Meridian (Miss)* 530 So 2d 1341.

63. *Lundell v Citrano* (1st Dist) 129 Ill App 3d 390, 84 Ill Dec 581, 472 NE2d 541; *Simpson v Smith* (Mo App) 771 SW2d 368.

64. *Gaston v Hunter* (App) 121 Ariz 33, 588 P2d 326 (medical malpractice and products liability action).

65. *Lundell v Citrano* (1st Dist) 129 Ill App 3d 390, 84 Ill Dec 581, 472 NE2d 541.

66. *Cruz v Union P.R. Co.* (Colo App) 707 P2d 360; *Good v A.B. Chance Co.*, 39 Colo App 70, 565 P2d 217; *Duffy v Midlothian Country Club* (1st Dist) 135 Ill App 3d 429, 90 Ill Dec 237, 481 NE2d 1037.

67. *Dalrymple v Fields*, 276 Ark 185, 633 SW2d 362 (housing code violations); *Ganey v*

Doran (1st Dist) 191 Cal App 3d 901, 236 Cal Rptr 787 (federal regulation).

Forms: Memorandum in support of motion to preclude evidence relating to OSHA or ANSI regulations. *Swartz & Swartz, Handbook of Personal Injury Forms & Litigation* (1982), § 6:17.2.

68. *MBL (USA) Corp. v Diekman* (1st Dist) 112 Ill App 3d 229, 67 Ill Dec 938, 445 NE2d 418, 221 USPQ 725, app den 94 Ill 2d 553, later proceeding (1st Dist) 137 Ill App 3d 238, 91 Ill Dec 812, 484 NE2d 371, 1985-2 CCH Trade Cases ¶ 66899.

69. *Taylor v Southern Pacific Transp. Co.*, 130 Ariz 516, 637 P2d 726 (current marital status; wrongful death action); *Swartwood v Burlington Northern, Inc.* (Colo App) 669 P2d 1051 (remarriage of plaintiff; wrongful death action); *Olsen v French (Me)* 456 A2d 869 (evidence relating to wife's former boyfriend or living arrangements she had with him; action to recover for personal injuries sustained in automobile accident by husband and wife who were divorced after accident).

70. *Sperberg v Goodyear Tire & Rubber Co.* (CA6 Ohio) 519 F2d 708, 186 USPQ 453, cert den 423 US 987, 46 L Ed 2d 303, 96 S Ct 395, 188 USPQ 48.

71. *Proper v Mowry* (App) 90 NM 710, 568 P2d 236 (action involving claim of slander made by physician where defense attorney sought to mention, inter alia, alleged adultery on part of physician, excessive fees, and reputation for sloppy record keeping of physician).

72. *Board of Education v Porter*, 234 Kan 690, 676 P2d 84 (condemnation action; exclusion of evidence of building and mechanical equipment from consideration of value of property to which equipment was attached, where responding party had erected building

—Pecuniary circumstances of plaintiff's family⁷³

—Insurance coverage or payments⁷⁴

Various other matters may also be raised on a motion in limine to exclude certain evidence.⁷⁵

III Observation: Motions in limine appear to have frequent use in condemnation cases, seeking to bar various types of evidence.⁷⁶

§ 103. —Criminal cases

In criminal cases, some of the matters amenable to a motion in limine include the determination in advance of trial of the admissibility of evidence of character or conduct; of prior convictions; of statements under belief of impending death; and in some instances of the opinions of investigating

after notice of condemnation and equipment was severable personalty).

In action arising out of motor vehicle accident, trial court erred in granting defendant's post-trial motion for credit against judgment for advance payments to plaintiff against possible verdict in lawsuit, and proper procedure for defendant or insurer seeking credit for advance payments against possible verdict was to affirmatively plead such payments so that there would be notice of such claim, and after plea it would then be proper for defendant or insurer to make motion in limine to exclude any evidence of advance payments during trial of case before jury. *Matthews v Watkins Motor Lines, Inc.* (Miss) 419 So 2d 1321.

73. *Nolan v Elliott* (2d Dist) 179 Ill App 3d 1077, 129 Ill Dec 288, 535 NE2d 1053, app den 126 Ill 2d 560, 133 Ill Dec 670, 541 NE2d 1108.

74. *Nolan v Elliott* (2d Dist) 179 Ill App 3d 1077, 129 Ill Dec 288, 535 NE2d 1053, app den 126 Ill 2d 560, 133 Ill Dec 670, 541 NE2d 1108.

Forms: Motion—In limine—For order prohibiting reference during trial to insurance payments received by plaintiff. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 62.

75. The defense of collateral estoppel may be raised by a motion in limine, where the opposing party suffered no prejudice and failed to request a continuance. *Aufderhar v Data Dispatch, Inc.* (Minn App) 437 NW2d 679, affd (Minn) 452 NW2d 648.

A preclusion order may bar evidence controverting elements of an allegation of malpractice. *Peat, Marwick, Mitchell & Co. v Superior Court* (1st Dist) 200 Cal App 3d 272, 245 Cal Rptr 873, mod on other grounds (Cal App 1st Dist) slip op and cert dismd 490 US 1086, 104 L Ed 2d 673, 109 S Ct 2114 (preclusion as a sanction for the defendant accounting firms's merger with an accounting firm retained by the People as their expert witness.

In an action contesting a will, the trial court may prohibit the executor's attorney from referring, in his opening statement, to the fact that the probate court had found the will to be valid. *Hammett v Reynolds*, 243 Ga 669, 256 SE2d 354.

If a physician questions a litigant about circumstances of an accident beyond those questions necessary for sensible medical history, the resulting testimony or report may properly be subject of a motion in limine. *Wood v Chicago, M., S.P. & P.R. Co.* (Minn App) 353 NW2d 195.

Trial court in medical malpractice action did not err in granting motion in limine prohibiting defendant from establishing he had requested opportunity to examine plaintiff but that plaintiff had objected, where objection had been sustained. *Prevost v Taylor*, 196 Ga App 368, 396 SE2d 17.

A court could exclude evidence, in an action on a promissory note, that the creditors failed to pay fair market value for the property securing the note where there was no mention in the complaint as to inadequacy of purchase price paid for the property. *Graff v North Port Dev. Co.* (Mo App) 734 SW2d 221, 4 UCCRS2d 1327, later proceeding (Mo App) 763 SW2d 683.

76. *State v Alaska Continental Development Corp.* (Alaska) 630 P2d 977 (enhancement of value of land); *Arkansas State Highway Com. v Pulaski Invest. Co.*, 272 Ark 389, 614 SW2d 675 (purpose of government body's condemnation of tract); *Arkansas State Highway Com. v First Pyramid Life Ins. Co.*, 269 Ark 278, 602 SW2d 609 (offers to purchase the land); *Aurora v Webb*, 41 Colo App 11, 585 P2d 288 (possibility of rezoning the property); *Georgia Power Co. v Bishop*, 162 Ga App 122, 290 SE2d 328 (location of easement); *Indiana & Michigan Electric Co. v Pounds* (Ind App) 426 NE2d 45, reh den (Ind App) 428 NE2d 108 (price paid by condemnee).

officers.⁷⁷ An in limine ruling may also bar evidence regarding the effect of defendant's consumption of intoxicants⁷⁸ or his addiction-prone personality⁷⁹ on his ability to form the required intent for commission of the offenses charged. And the prosecution may obtain an in limine order preventing the defense from bringing to the jury's attention other sexual acts or behavior by the victim of a sexual offense,⁸⁰ or from making reference to the murder victim's alleged drug use and homosexuality in defense counsel's opening statement.⁸¹

The government may also move for an order restricting defense counsel from cross-examining a government informant with regard to certain matters,⁸² or from presenting evidence concerning a defense that fails as a matter of law.⁸³ Polygraph evidence may likewise be barred by an in limine motion and order.⁸⁴ In a prosecution for theft, the defendant may seek to exclude all evidence items allegedly taken by defendant which were not specifically named in the informations under which he was charged.⁸⁵

On the other hand, a motion in limine cannot be used as a means of challenging the constitutional validity of defendant's prior conviction, since other procedural vehicles already exist for that purpose.⁸⁶

b. MAKING THE MOTION [§§ 104-107]

§ 104. Generally; oral or written motion

Although an oral motion in limine may be proper, and the motion is not

77. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

It has been held that the defendant in a murder trial was not prejudiced by the granting of an in limine motion to exclude reference to a possible juvenile record of the state's witness where the order did not totally exclude such evidence but required defendant to seek permission outside the presence of the jury and to make an offer of proof as to what the testimony would be, and defendant failed to comply with either requirement. *Bowman v State (Okla Crim)* 585 P2d 1373, cert den 440 US 920, 59 L Ed 2d 471, 99 S Ct 1243, post-conviction proceeding (Okla Crim) 789 P2d 631.

Practice References: 5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases; 20 Am Jur Trials 441, Motion in Limine Practice §§ 38-50.

Bailey & Rothblatt, *Successful Techniques for Criminal Trials* (2d ed, 1985), §§ 4:17 et seq., 4:22 et seq.

78. *Wyant v State (Del Sup)* 519 A2d 649.

79. *State v Winters (App)* 160 Ariz 143, 771 P2d 468, 30 Ariz Adv Rep 48.

80. *Nelson v State (Ala App)* 534 So 2d 1118; *Flurry v State*, 290 Ark 417, 720 SW2d 699.

81. *Scott v Dugger (SD Fla)* 686 F Supp 1488, affd (CA11 Fla) 891 F2d 800, reh den, en banc

(CA11 Fla) 898 F2d 160 and cert den (US) 112 L Ed 2d 179, 111 S Ct 224.

82. *United States v Chaverra-Cardona (ND Ill)* 669 F Supp 1445, later proceeding (CA7 Ill) 879 F2d 1551, 28 Fed Rules Evid Serv 814, later proceeding (CA7 Ill) 885 F2d 354, 28 Fed Rules Evid Serv 623, habeas corpus proceeding (ND Ill) 1989 US Dist LEXIS 12882, supp op (ND Ill) 1989 US Dist LEXIS 13279 and post-conviction proceeding (ND Ill) 725 F Supp 1459.

83. *United States v Corona (SD NY)* 687 F Supp 84, affd without op (CA2 NY) 868 F2d 1268 (putative duress defense); *Erlandson v State (Tex App Houston (14th Dist))* 763 SW2d 845, petition for discretionary review ref (Apr 26, 1989) and motion for rehearing on PDR denied (May 24, 1989) and motion for rehearing on PDR denied (Jun 7, 1989) and cert den (US) 107 L Ed 2d 110, 110 S Ct 152 (justification defenses inapplicable in trespass prosecution).

84. *Watkins v State (Ind)* 528 NE2d 456; *State v Mills (La App 2d Cir)* 505 So 2d 933, cert den (La) 508 So 2d 65; *State v Pollock (Mo App)* 735 SW2d 179.

85. *State v Howell*, 226 Mont 148, 734 P2d 214.

86. *People v Knack*, 72 NY2d 825, 530 NYS2d 541, 526 NE2d 32.

required to be in writing,⁸⁷ oral motions and orders provide fertile ground for confusion and misunderstanding during the trial.⁸⁸ For this reason, in addition to a written motion, a written proposed order should be prepared by the moving party prior to the trial court's ruling on the motion. The proposed order must clearly and specifically outline the evidence to be excluded, and the trial court's subsequent disposition of the motion and its limitations on the presentation of evidence would then be part of the record of the cause.⁸⁹

■■■■ **Recommendation:** A written motion should be used in cases where the issues tend to be complicated, since a formal, carefully organized and worded motion will most clearly and persuasively advance counsel's arguments. A written motion is also preferable whenever counsel anticipates the possibility of an appeal involving the particular evidence.⁹⁰

§ 105. Notice of motion and supporting affidavit

With any written motion in limine, counsel should give notice to the opposing party in a form appropriate to the practice in the forum jurisdiction.⁹¹ While the motion in limine may be made at any time before the challenged evidence is offered or alluded to before the jury (even during the trial if there should be unexpected developments), as a practical matter the motion should be served and filed as early as possible in the proceedings.⁹² It should be noted, however, that a code provision requiring that a written motion and notice of the hearing thereof must be served not later than 5 days before the time specified for the hearing, has been held inapplicable to a motion in limine which frequently is oral, not written, and often is made at the commencement of trial.⁹³

As in motion practice generally,⁹⁴ a motion in limine should be accompanied by a supporting affidavit verifying the facts on which it is founded.⁹⁵

§ 106. Specificity

Because the motion in limine is a powerful and potentially dangerous

87. *Loof v Sanders* (Alaska) 686 P2d 1205.

Law Reviews: Murphy, Oral motions in limine, 14 *Litigation* (no. 3) 15 (March 1988).

88. *Lundell v Citrano* (1st Dist) 129 Ill App 3d 390, 84 Ill Dec 581, 472 NE2d 541.

An oral motion for an in limine order, phrased differently each time, and the court's statement which simply granted "this motion" do not meet the specificity requirement. *Lockett v Bi-State Transit Authority*, 94 Ill 2d 66, 67 Ill Dec 830, 445 NE2d 310.

89. *Lundell v Citrano* (1st Dist) 129 Ill App 3d 390, 84 Ill Dec 581, 472 NE2d 541.

In action for damages arising out of death which occurred as result of automobile-freight train collision, where trial court excluded evidence of prior accidents at same crossing, there was no reversible error where reviewing court could not ascertain from the record what evidence was excluded by granting the motion in limine. *Runkle v Burlington Northern*, 188 Mont 286, 613 P2d 982.

90. **Practice References:** 20 Am Jur Trials 441, Motion in Limine Practice § 60.

91. **Practice References:** Notice of motion in limine to opposing party. 20 Am Jur Trials 441, Motion in Limine Practice § 62.

Carlson, *Successful Techniques for Civil Trial* (1983), § 1:63.

Generally as to notice of motion, see 56 Am Jur 2d, Motions, Rules, and Orders § 12.

92. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

93. *Walton v Detry*, 185 Ga App 88, 363 SE2d 295, stating further that even if the provision was applicable, a violation thereof would not be cause for reversal unless harm can be shown.

94. See 56 Am Jur 2d, Motions, Rules, and Orders § 13.

95. *State v Suggs*, 86 NC App 588, 359 SE2d 24, cert den 321 NC 299, 362 SE2d 786.

weapon,⁹⁶ it is imperative that the in limine motion and the subsequent order be clear and specific, and that all parties concerned have an accurate understanding of its limitations.⁹⁷ This is particularly true where violations of in limine order may serve as the basis for appellate review and a possible new trial.⁹⁸ A vague⁹⁹ or overbroad¹ motion is properly denied and an appellate court will not reverse such decision.

§ 107. Form drafting guide

Counsel must use considerable care in drafting the motion and, if successful, the order to be signed by the trial judge. At a minimum, the moving papers must contain information sufficient to enlighten the court and opposing counsel of the relevant facts and circumstances so that the court may intelligently act on the motion.² A motion that is vague, indefinite, or overbroad will be ineffective.³

The terminology of the order must be general enough to prohibit the opposing party from injecting the same prejudice in a roundabout manner, yet at the same time it must be precise enough to warn the opposition of the specific prohibited tactics and references. The order should make it clear that all parties and witnesses, as well as the attorneys, are forbidden to raise the sensitive matters before the jury.⁴ It should leave no doubt that all direct and indirect forms of communication,⁵ including pleadings, questions, testimony,

96. § 99.

97. *Lockett v Bi-State Transit Authority*, 94 Ill 2d 66, 67 Ill Dec 830, 445 NE2d 310; *Reidelberger v Highland Body Shop, Inc.*, 83 Ill 2d 545, 48 Ill Dec 237, 416 NE2d 268.

See also *Lundell v Citrano* (1st Dist) 129 Ill App 3d 390, 84 Ill Dec 581, 472 NE2d 541, holding that the in limine order granting defendant's motion lacked the required clarity in that it barred plaintiff from presenting any testimony of any diagnosis or medical opinion "other than by competent medical testimony," thus granting nothing more than the application of ordinary evidentiary rules.

Law Reviews: Motions in limine—need for specificity, 27 *Trial Lawyer's Guide* (no. 1) 150 (March 1983); Saltzburg, *Tactics of the motion in limine*, 9 *Litigation* 17 (Summer 1983).

Practice References: 20 *Am Jur Trials* 441, *Motion in Limine Practice* §§ 53-65.

Forms: *Motion in limine*. 23 *Am Jur Pl & Pr Forms* (Rev), *Trial, Forms* 61:1-61.5, 71.

—General form for motion, and motion from actual civil rights case and from actual automobile collision case. *Carlson, Successful Techniques for Civil Trial* (1983), §§ 1:62 et seq.

—Motion to exclude collateral source matters or certain other facts. *Swartz & Swartz, Handbook of Personal Injury Forms & Litigation* (1982), §§ 6:15-6:17.

98. *Reidelberger v Highland Body Shop, Inc.* (5th Dist) 79 Ill App 3d 1138, 35 Ill Dec 413, 399 NE2d 247, *aff'd* 83 Ill 2d 545, 48 Ill Dec 237, 416 NE2d 268.

99. *Schichtl v Slack*, 293 Ark 281, 737 SW2d 628.

1. *Cole v Sheraton Atlanta Corp.*, 159 Ga App 439, 283 SE2d 668; *Kelley v First State Bank* (3d Dist) 81 Ill App 3d 402, 36 Ill Dec 566, 401 NE2d 247; *Bradley v Caterpillar Tractor Co.* (5th Dist) 75 Ill App 3d 890, 31 Ill Dec 623, 394 NE2d 825 (overly broad in limine orders unduly restricted defense).

2. *Bridges v Richardson* (Tex Civ App Dallas) 349 SW2d 644, writ ref n r e 163 Tex 292, 354 SW2d 366.

Practice References: *Bailey & Rothblatt, Successful Techniques for Criminal Trials* (2d ed, 1985), §§ 4:28 et seq.

Forms: *Motion*—To obtain preliminary ruling on admissibility of anticipated evidence—*Statement of grounds of objection thereto*. 23 *Am Jur Pl & Pr Forms* (Rev), *Trial, Form* 71.

3. § 106.

4. See, for example, the trial courts' orders in *Volkswagen of America, Inc. v Harrell* (Ala) 431 So 2d 156, 36 UCCRS 553; *Cook v Philadelphia Transp. Co.*, 414 Pa 154, 199 A2d 446; *Alamo Express, Inc. v Wafer* (Tex Civ App Fort Worth) 333 SW2d 651; *Montgomery v Vinzant* (Tex Civ App Fort Worth) 297 SW2d 350.

5. See, for example, the trial court's order in *Alamo Express, Inc. v Wafer* (Tex Civ App Fort Worth) 333 SW2d 651.

remarks, and arguments, are within the scope of the court's order.⁶

C. HEARING ON MOTION [§§ 108–114]

§ 108. Generally

In some jurisdictions, and in some courts within a jurisdiction, the motion in limine is determined on the strength of the moving papers and opposing pleadings alone, while in other jurisdictions and courts the adversaries are afforded an opportunity to present argument at a hearing.⁷

■■■■ Observation: Even the type of hearing, if any, may vary from one court to another. Unless statutes or rules specifically prescribe a motion in limine hearing, counsel must accept whatever type is provided by local practice and sound judicial discretion.⁸

■■■■ Reminder: Irrespective of the type of proceeding held, counsel must see that a clear and complete record of the proof offered and the court's ruling is preserved.⁹ Furthermore, the duty of bringing a motion in limine to the attention of the judge and requesting a hearing is the responsibility of counsel for the moving party.¹⁰

Resolution of a motion in limine on the morning of trial has been criticized because the gravity of such a motion requires that it be resolved at a hearing, on the record, held prior to the date of trial; by disposing of a key issue sufficiently in advance of trial, an equitable result is attained because the parties may then prepare the theory of their case for trial with foreknowledge of whether a party will be allowed to introduce evidence affecting the issue, and in addition this procedure creates a proper remedy for either writ of review or appeal as it provides the parties an opportunity to seek review of the trial court's ruling prior to the date of trial and/or provides a record for the reviewing court to evaluate the correctness of the lower court's ruling.¹¹

Generally, after a hearing, the trial court may grant or deny¹² the motion, or it may, within its discretion, refuse to rule on the motion and reserve ruling on the admissibility of the evidence until it is offered during trial.¹³ Thus, the

6. See, for example, the trial court's order in *Wagner v Larson*, 257 Iowa 1202, 136 NW2d 312.

7. Generally as to disposition of motions with and without hearings, see 56 Am Jur 2d, Motions, Rules, and Orders §§ 22-26.

8. **Practice References:** 20 Am Jur Trials 441, Motion in Limine Practice § 66.

9. See *Runkle v Burlington Northern*, 188 Mont 286, 613 P2d 982, holding that there was no reversible error where the reviewing court could not ascertain from the record what evidence was excluded by the granting of the motion in limine, there having been no offer of proof; *Bridges v Richardson* (Tex Civ App Dallas) 349 SW2d 644, writ ref n re 163 Tex 292, 354 SW2d 366, noting that the record did not contain an order of the court on the motion, that it was extremely vague and indefinite as to the ruling of the court on the motion, and that there was nothing in the record to indicate

that evidence was introduced in support of the motion.

10. *McBride v State* (Miss) 492 So 2d 581.

11. *Douget v Touro Infirmary* (La App 4th Cir) 537 So 2d 251.

12. § 109.

13. *United States v Masters* (CA8 Mo) 840 F2d 587, 25 Fed Rules Evid Serv 235; *United States v Browne* (CA9 Or) 829 F2d 760, 23 Fed Rules Evid Serv 1089, cert den 485 US 991, 99 L Ed 2d 508, 108 S Ct 1298; *United States v Dahlin* (CA8 Minn) 734 F2d 393, 15 Fed Rules Evid Serv 849; *Morris v Southern Bell Tel. & Tel. Co.*, 180 Ga App 145, 348 SE2d 573; *People v Escobar* (1st Dist) 168 Ill App 3d 30, 118 Ill Dec 736, 522 NE2d 191, app den 122 Ill 2d 583, 125 Ill Dec 226, 530 NE2d 254, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 2995; *State v Buckley* (Me) 548 A2d 505.

court may simply defer its determination of the issue until trial, when the record has been more fully developed.¹⁴ However, in some instances a failure to rule on a motion may constitute reversible error.¹⁵

§ 109. Grant or denial of motion, in general

A motion in limine is addressed to the discretion of the trial court, and its ruling will be reversed only in the event of abuse of such discretion.¹⁶ It has been said that a trial justice should respond to the motion so long as he has before him all of the relevant information upon which a decision might be based.¹⁷ The motion should be granted only when the trial court finds two factors are present: (1) the material or evidence in question will be inadmissible at trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material or evidence will tend to prejudice the jury.¹⁸ Where the motion is granted, the nonmoving party, by virtue of the adverse ruling, is precluded from taking some proposed or anticipated action.¹⁹

On the other hand, it is not uncommon for the trial court to deny or overrule a pretrial motion for a variety of reasons, most often on the grounds that the irrelevance or prejudicial nature of the evidence sought to be suppressed has not been shown.²⁰ Thus, where the potential for prejudice by admission of the evidence is limited, and the probative value of the evidence is strong, the trial court's denial of the motion is not an improvident exercise of discretion.²¹ And, it is acceptable and standard practice for a trial court to deny a motion in limine initially and then allow the moving party to object at the time the evidence is later sought to be introduced.²² In order to demonstrate that the trial justice abused his or her discretion by not granting the motion in limine, the movant must demonstrate that (1) he was prejudiced as a result of the introduction of the evidence and (2) this prejudice resulted in

The trial court has an absolute right to refuse to decide the admissibility of evidence, allegedly violative of some ordinary rule of evidence, prior to trial. *Locke v Vonalt*, 189 Ga App 783, 377 SE2d 696.

The trial judge will be alert to the possibility that in certain cases a ruling on the admissibility of the challenged evidence may not be appropriate in limine because his ruling may require an evaluation of the evidence actually adduced at trial. *Gendron v Pawtucket Mut. Ins. Co. (Me)* 409 A2d 656.

14. *United States v Feola* (SD NY) 651 F Supp 1068 (disagreed with on other grounds by *Wabash Valley Power Asso. v Public Service Co. (SD Ind)* 678 F Supp 757, CCH Fed Secur L Rep ¶ 93724) and *affd without op* (CA2 NY) 875 F2d 857, cert den (US) 107 L Ed 2d 72, 110 S Ct 110; *Commonwealth v Noble*, 24 Mass App 421, 509 NE2d 930.

15. *State v Lariviere* (RI) 527 A2d 648 (superseceded by statute on other grounds as stated in *State v Maxie* (RI) 554 A2d 1028) and (superseceded by statute on other grounds as stated in *State v Mattatall* (RI) 586 A2d 1061) (criminal

prosecution involving motion in limine by defendant seeking to determine which of his prior convictions the state would be permitted to use to impeach him if he decided to testify).

16. § 97.

17. *State v Cruz* (RI) 517 A2d 237.

18. *Whittley v Meridian* (Miss) 530 So 2d 1341.

See also the general discussion in § 94.

19. *Baxter v Surgical Clinic of Anniston, P.A.* (Ala) 495 So 2d 652.

20. See, for example, *Commonwealth v Perkins*, 6 Mass App 964, 384 NE2d 215; *Shaw v Richardson* (Miss) 392 So 2d 213; *State, Dept. of Human Resources v Mock*, 83 Or App 1, 730 P2d 553, review den 302 Or 615, 733 P2d 450.

21. *People v Davis* (2d Dept) 151 App Div 2d 596, 542 NYS2d 354, app den 74 NY2d 794, 545 NYS2d 555, 544 NE2d 233.

22. *People v Mosley* (5th Dist) 145 Ill App 3d 884, 99 Ill Dec 591, 495 NE2d 1326.

an unfair trial.²³ However, it has been noted that denial of the motion rarely imposes a hardship on the requesting party.²⁴

■■■■ *Observation:* Where a party files a motion in limine with the trial court seeking to suppress certain testimony, but the trial court neither signs nor rules on the motion, the motion will be held not to have been granted.²⁵ A trial court cannot “implicitly” sustain a motion in limine; the judge must decide and record his ruling on the motion in some fashion.²⁶

■■■■ *Practice guide:* If there is a retrial, counsel is not obliged to test or relitigate the court’s earlier rulings on pretrial motions, even if a different judge is presiding at the retrial. The mistrial does not render null all that went before it, and the trial court’s pretrial determinations and the objections and exceptions thereto survive the mistrial, and remain effective.²⁷

§ 110. Violation of exclusionary ruling

A distinct issue which has arisen in some cases is whether an exclusionary ruling made pursuant to a preliminary motion to secure the exclusion of anticipated prejudicial matter is binding on the trial judge so that his failure to enforce the prior ruling would constitute reversible error.²⁸ It has been said that for violations of an order in limine to serve as the basis for a new trial, the violations must be clear and rise to the level of having so prejudiced the party as to have denied him or her a fair trial.²⁹ Not surprisingly, the results of the cases have gone both ways depending on the particular factual situation, with some courts holding that permitting violation of the ruling was reversible error,³⁰ and other courts holding that there was no reversible error,³¹ as where

23. *State v Dehetre* (Me) 539 A2d 1097; *State v Summers*, 92 NC App 453, 374 SE2d 631, review den 324 NC 341, 378 SE2d 806.

24. *State v Dubois*, 150 Vt 600, 556 A2d 86.

25. *Wilkins v Royal Indem. Co.* (Tex Civ App Tyler) 592 SW2d 64.

Where the trial court failed to determine a motion to suppress evidence and submitted the issue of probable cause for the defendant’s arrest to the jury, a determination by the trial court after the trial that there was or was not probable cause would not be sufficient to remedy the error, and a new trial would be granted. *Brown v State* (Fla App D4) 352 So 2d 61.

26. *Vandever v Junior College Dist.* (Mo App) 708 SW2d 711.

27. *State v Goding*, 128 NH 267, 513 A2d 325.

28. ■■■■ *Observation:* On a related issue not raised in the cases within the scope of this discussion, it has been observed that if in any trial certain evidence precluded by a pretrial conference order becomes relevant by reason of development of proof at the trial, it could then be reversible error to blindly adhere to the prior order. See 62A Am Jur 2d, Pretrial Conference and Procedure § 34.

29. *Smith v Perlmutter* (3d Dist) 145 Ill App 3d 783, 99 Ill Dec 783, 496 NE2d 358.

30. *Seay v Urban Medical Hospital, Inc.*, 172 Ga App 344, 323 SE2d 190, later proceeding 179 Ga App 874, 348 SE2d 315; *Shehy v Bober* (1st Dist) 78 Ill App 3d 1061, 34 Ill Dec 405, 398 NE2d 80; *Department of Public Works & Bldgs. on behalf of People v Sun Oil Co.* (5th Dist) 66 Ill App 3d 64, 22 Ill Dec 826, 383 NE2d 634; *Cody v Mustang Oil Tool Co.* (Tex Civ App Eastland) 595 SW2d 214, writ ref n re (Jul 2, 1980) and reh of writ of error overr (Jul 30, 1980); *State v Smith*, 189 Wash 422, 65 P2d 1075.

See also *Lapasinskas v Quick*, 17 Mich App 733, 170 NW2d 318, where a trial judge was held to have committed reversible error by permitting the violation of an exclusionary ruling made pursuant to a preliminary motion to secure the exclusion of anticipated prejudicial matter, even though the trial judge had instructed the jury to disregard the prejudicial matter.

Annotations: Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311 § 4[a].

the violation was not deliberate or knowing.³²

■■■■ Observation: In most of the cases in which permitting violation of the exclusionary ruling was held reversible error, the trial judge had not instructed the jury to disregard the prejudicial matter. And in the cases in which permitting violation of the exclusionary ruling was held not reversible error, either the trial judge had instructed the jury to disregard the prejudicial matter or there had been no request for such an instruction.³³ It seems incongruous that the presence or absence of a “curative” instruction, or a request for one, should be determinative of the outcome in such cases, since the chief reason for allowing such exclusionary motions in the first place is that no amount of objection or instruction could remove the prejudicial effect of the excluded matter.³⁴

■■■■ Caution: In order to preserve error based on purported violations of a previously granted motion in limine, the complaining party must raise a timely objection to allegedly improper statements or questions.³⁵ Objection to the violation of an in limine order may be waived by failure to request a curative instruction.³⁶

The sanction for violation of an order in limine is within the discretion of the trial court and under appropriate circumstances might extend to declaration of a mistrial and/or punishment for contempt.³⁷ But, where the court granted a motion in limine, and the court itself violated the order by instructing the jury several times on separate occasions regarding the subject matter of the order, and plaintiff’s counsel also referred to the subject, it was held that the bell having been rung both by the court and the plaintiff in his argument to the jury, the court could not “unring the bell” and penalize the

Practice References: 20 Am Jur Trials 441, Motion in Limine Practice § 70.

31. *Grimshaw v Ford Motor Co.* (4th Dist) 119 Cal App 3d 757, 174 Cal Rptr 348, CCH Prod Liab Rep ¶ 8999; *Tate v Gray* (Fla App D2) 292 So 2d 618 (curative instruction given by court); *Perez v Hartmann* (1st Dist) 187 Ill App 3d 1098, 135 Ill Dec 455, 543 NE2d 1023 (curative instruction given by court); *Holmes v Sahara Coal Co.* (5th Dist) 131 Ill App 3d 666, 86 Ill Dec 816, 475 NE2d 1383 (disagreed with on other grounds by *Davis v International Harvester Co.* (2d Dist) 167 Ill App 3d 814, 118 Ill Dec 589, 521 NE2d 1282, CCH Prod Liab Rep ¶ 11790, app den 122 Ill 2d 572, 125 Ill Dec 214, 530 NE2d 242 and app den (Ill) 136 Ill Dec 583, 545 NE2d 107) and (disagreed with on other grounds by multiple cases as stated in *AMF, Inc. v Victor J. Andrew High School* (1st Dist) 172 Ill App 3d 337, 122 Ill Dec 325, 526 NE2d 584; *Plan-Tec, Inc. v Wiggins* (Ind App) 443 NE2d 1212 (party neither objected nor moved to strike prohibited response, nor asked court to admonish jury concerning answer); *State v Johnson* (Iowa) 183 NW2d 194 (curative instruction given by court); *Summers v Montgomery Elevator Co.*, 243 Kan 393, 757 P2d 1255; *Olsen v French* (Me) 456 A2d 869 (court gave curative instruction); *Zehner v Post Oak Oil Co.* (Okla App)

640 P2d 991, 72 OGR 555; *Padgett v State* (Tex Crim) 364 SW2d 397 (defendant’s counsel did not move court at trial to exclude testimony, to instruct jury to disregard it, or to declare mistrial); *Montgomery v Vinzant* (Tex Civ App Fort Worth) 297 SW2d 350 (court instructed jury to disregard evidence).

Annotations: 63 ALR3d 311 § 4[b].

32. *Maciukevicius v Zagorski* (1st Dist) 172 Ill App 3d 303, 122 Ill Dec 310, 526 NE2d 569.

33. See the cases cited in footnote 31, *supra*, and the parenthetical comments appended thereto.

Annotations: 63 ALR3d 311 § 4.

34. For an express statement of this rationale, see *Burrus v Silhavy*, 155 Ind App 558, 293 NE2d 794, 63 ALR3d 304.

35. *Webber v State* (Tex App Houston (14th Dist)) 757 SW2d 51, petition for discretionary review ref (Nov 16, 1988).

36. *Salcedo v State*, 188 Ga App 3, 372 SE2d 238, revd on other grounds 258 Ga 870, 376 SE2d 360 and vacated 190 Ga App 680, 381 SE2d 444.

37. *Brown v Terre Haute Regional Hospital* (Ind App) 537 NE2d 54.

defendants for violating the order by referring to the subject in its closing argument.³⁸

In a number of cases it has been held that the introduction of certain evidence at trial did not constitute a violation of the trial court's in limine order.³⁹

■■■ Observation: In so holding, some of the courts either stated or inferred that the motion and order were not sufficiently specific to bar the evidence.⁴⁰

§ 111. —Criminal cases

As in civil cases, it has been held in a number of cases that the introduction of certain evidence at trial did not constitute a violation of an in limine order.⁴¹ such as a rape victim's past sexual conduct with defendant,⁴² evidence

38. *Ross v Coleman Co.*, 114 Idaho 817, 761 P2d 1169, later proceeding (Idaho) 804 P2d 325.

39. See, for example, *Cabinet Realty, Inc. v Planning & Zoning Com.*, 17 Conn App 344, 552 A2d 1218, app den 210 Conn 813, 556 A2d 610 (testimony on cross-examination of witness as to changes made by plaintiff to property in order to obtain certificate of occupancy); *Giordano v Ramirez* (Fla App D3) 503 So 2d 947, 12 FLW 670 (inquiry into expert witness' background); *Soria v Sierra Pacific Airlines, Inc.*, 111 Idaho 594, 726 P2d 706, later app (Idaho) 752 P2d 603 (specific factual findings of various investigatory subgroups of the National Transportation and Safety Board); *Nolan v Elliott* (2d Dist) 179 Ill App 3d 1077, 129 Ill Dec 288, 535 NE2d 1053, app den 126 Ill 2d 560, 133 Ill Dec 670, 541 NE2d 1108 (evidence as to pecuniary circumstances of plaintiff's family); *Smith v Central Illinois Public Service Co.* (4th Dist) 176 Ill App 3d 482, 125 Ill Dec 872, 531 NE2d 51, app den 124 Ill 2d 562, 129 Ill Dec 156, 535 NE2d 921 (evidence that conduct of plaintiff's employer was a cause of plaintiff's injuries); *Dotson v Sears, Roebuck & Co.* (1st Dist) 157 Ill App 3d 1036, 110 Ill Dec 177, 510 NE2d 1208, app den (Ill) 113 Ill Dec 296, 515 NE2d 105, later app (1st Dist) 199 Ill App 3d 526, 145 Ill Dec 622, 557 NE2d 392 (defendant's admission of liability, of which jury was already well aware); *Wine v Bauerfreund* (1st Dist) 155 Ill App 3d 19, 107 Ill Dec 491, 507 NE2d 155 (evidence of issuance of traffic citation to defendant; error held to have been waived by defendant's counsel opening the door on cross-examination of witness); *Poltrock v Chicago & North Western Transp. Co.* (1st Dist) 151 Ill App 3d 250, 104 Ill Dec 540, 502 NE2d 1200 (questioning occurrence witness concerning his drinking before fatal accident); *Greenfield v Consolidated Rail Corp.* (5th Dist) 150 Ill App 3d 331, 103 Ill Dec 12, 500 NE2d 1083, app den 114 Ill 2d 545, 108 Ill Dec 417, 508 NE2d 728 (reference

to union benefits); *Brown v Terre Haute Regional Hospital* (Ind App) 537 NE2d 54 (evidence as to drinking); *Crown Plumbing, Inc. v Petrozak* (Tex App Houston (14th Dist)) 751 SW2d 936, writ den (Nov 16, 1988) (evidence as to employer's ability to pay damages).

40. See, for example, *Reidelberger v Highland Body Shop, Inc.* (5th Dist) 79 Ill App 3d 1138, 35 Ill Dec 413, 399 NE2d 247, affd 83 Ill 2d 545, 48 Ill Dec 237, 416 NE2d 268, stating that for violations of in limine order to serve as basis for new trial, order must be specific in its prohibitions and violations must be clear, and holding that order in limine prohibiting reference to vehicle movements in general area about 5 miles from accident was not clearly violated by defense counsel's references to vehicle movements about 2 miles from scene of accident and, even if violation did occur, it was not sufficiently prejudicial to warrant new trial.

Generally as to the requirement of specificity, see § 106.

41. *Hernandez v State*, 182 Ga App 797, 357 SE2d 131 (prosecution's question on cross-examination whether witness introduced defendant to drug dealer so he could buy drugs held not to violate in limine order barring evidence of similar transactions, where question was asked for impeachment purposes); *People v Lindsey* (5th Dist) 148 Ill App 3d 751, 102 Ill Dec 158, 499 NE2d 715 (holding that state did not violate order as to the details of reports made by the victim where the testimony simply repeated the victim's words in complaining about the incident); *Koehler v State* (Ind) 499 NE2d 196 (statement by prosecutor to jury, during closing argument, that it could not consider punishment in rendering verdict and that judge had many sentencing alternatives, did not constitute violation of state's own motion in limine regarding penalties for the crime, since prosecutor's comment was general statement of law and was not only accurate but also proper, notwithstanding order in limine); *State v Fredrick*, 45 Wash App 916, 729 P2d 56

of prior convictions,⁴³ or a nonresponsive and gratuitous statement by the arresting officer on cross-examination.⁴⁴ An order excluding testimony regarding the pursuit and apprehension of defendant has been held not to cover defendant's subsequent escape from jail some time later.⁴⁵

■■■■ **Caution:** There is no violation of an evidentiary restriction stated in an in limine order obtained by defendant where his own counsel subsequently "opened the door" by asking a witness certain questions on direct examination and the state on cross-examination merely followed up on the questions.⁴⁶

In a few cases it has been held that the prosecution violated an in limine order preventing it from presenting specified evidence at trial.⁴⁷

§ 112. Reviewability of ruling; procedure in event of denial of motion

The trial court's ruling on a motion in limine is not a final ruling on the admissibility of the evidence in question,⁴⁸ but only interlocutory,⁴⁹ tentative,⁵⁰ or preliminary⁵¹ in nature. As such, it is subject to reconsideration and change by the court during the course of the trial,⁵² as the evidence in the trial is fully

(detective's testimony held not to have violated ruling in limine excluding evidence of any cocaine recovered at defendant's residence).

42. *Munn v State* (Ind) 505 NE2d 782.

43. *Tarver v State* (Ala App) 500 So 2d 1232, affd, en banc (Ala) 500 So 2d 1256, cert den 482 US 920, 96 L Ed 2d 685, 107 S Ct 3197 (prosecutor's question as to additional convictions held not to violate in limine order prohibiting admission into evidence of journal entry from a specific county).

Where the court's in limine order barring the state and its witnesses from referring to other crimes was issued at the conclusion of jury selection, and the prosecutor's remark regarding another offense was made before jury selection, the remarks were not in contravention of the court's order but were indistinct references to another part of the res gestae of the offense for which defendant was on trial. *State v McDaniel* (La App 1st Cir) 515 So 2d 572, cert den (La) 533 So 2d 10.

44. *Howard v State* (Ala App) 506 So 2d 351.

45. *State v Alger* (Idaho App) 764 P2d 119, review den (Idaho) 1989 Ida LEXIS 9.

46. *State v Whitmore* (Me) 540 A2d 465.

The prohibition imposed by a motion in limine may be lifted if defendant's evidence "opens the door." *People v Nearn* (1st Dist) 178 Ill App 3d 480, 127 Ill Dec 637, 533 NE2d 509.

47. *People v Nolan* (5th Dist) 188 Ill App 3d 251, 135 Ill Dec 637, 543 NE2d 1384 (prior conviction).

48. *Baxter v Surgical Clinic of Anniston, P.A.* (Ala) 495 So 2d 652; *Mason v State* (Ind) 539

NE2d 468; *Brown v Terre Haute Regional Hospital* (Ind App) 537 NE2d 54; *State v Grubb*, 28 Ohio St 3d 199, 28 Ohio BR 285, 503 NE2d 142; *State v Floyd*, 295 SC 518, 369 SE2d 842; *Tempo Tamers, Inc. v Crow-Houston Four, Ltd.* (Tex App Dallas) 715 SW2d 658, 69 ALR4th 337, writ ref n re (Oct 15, 1986) and reh of writ of error overr (Dec 3, 1986).

49. *State v Grubb*, 28 Ohio St 3d 199, 28 Ohio BR 285, 503 NE2d 142; *State v Hill* (Hamilton Co) 37 Ohio App 3d 72, 523 NE2d 894, motion overr; *Simpson v Smith* (Mo App) 771 SW2d 368; *Sooter v Magic Lantern, Inc.* (Mo App) 771 SW2d 359; *State v Swann*, 322 NC 666, 370 SE2d 533.

50. *State v Grubb*, 28 Ohio St 3d 199, 28 Ohio BR 285, 503 NE2d 142.

51. *Ely v National Super Markets, Inc.* (4th Dist) 149 Ill App 3d 752, 102 Ill Dec 498, 500 NE2d 120, app den 114 Ill 2d 544, 108 Ill Dec 416, 508 NE2d 727; *Manner v H.E.T., Inc.* (Mo App) 739 SW2d 724.

52. *Romanek-Golub & Co. v Anvan Hotel Corp.* (1st Dist) 168 Ill App 3d 1031, 119 Ill Dec 482, 522 NE2d 1341; *Anderson v Rojana-sathit* (Mo App) 714 SW2d 894; *State v Swann*, 322 NC 666, 370 SE2d 533; *State v Grubb*, 28 Ohio St 3d 199, 28 Ohio BR 285, 503 NE2d 142; *State v Floyd*, 295 SC 518, 369 SE2d 842; *Bobo v State* (Tex App Houston (14th Dist)) 757 SW2d 58, petition for discretionary review ref (Dec 21, 1988) and motion for rehearing on PDR denied (Jan 18, 1989) and cert den 490 US 1066, 104 L Ed 2d 631, 109 S Ct 2066.

When the trial court denies a motion to exclude evidence, made in limine, unless he clearly indicates to the contrary, it is the legal

developed.⁵³ As a result, the ruling on such a motion is not immediately appealable,⁵⁴ and any claimed error based on the denial of the motion and subsequent admission of the evidence must be predicated on renewal of the motion during trial, giving the trial court an opportunity to rule on the admissibility of the evidence,⁵⁵ and on timely and proper⁵⁶ objection when the evidence is offered at trial.⁵⁷ In other words, if the trial judge denies the

equivalent to an announcement that he reserves the right to rule on the subject evidence at the time of its offer, and is not a final ruling made in a pretrial context. *Baxter v Surgical Clinic of Anniston, P.A.* (Ala) 495 So 2d 652.

Permitting testimony regarding defendant's background as nongambler, after having granted motion in limine to exclude such testimony, was proper as court in essence reconsidered its ruling at time evidence was offered and such change in ruling carried presumption of correctness. *Blackburn v State* (Fla App D4) 314 So 2d 634, cert den (Fla) 334 So 2d 603 and cert den 429 US 864, 50 L Ed 2d 142, 97 S Ct 170, reh den 429 US 933, 50 L Ed 2d 303, 97 S Ct 342.

The grant of a motion in limine is malleable in the discretion of the court. *State v Hill* (Hamilton Co) 37 Ohio App 3d 72, 523 NE2d 894, motion overr.

53. *Ely v National Super Markets, Inc.* (4th Dist) 149 Ill App 3d 752, 102 Ill Dec 498, 500 NE2d 120, app den 114 Ill 2d 544, 108 Ill Dec 416, 508 NE2d 727; *Anderson v Rojanasathit* (Mo App) 714 SW2d 894.

An order on a motion in limine is an "advisory opinion subject to change as events at trial unfold." *Moore v General Motors Corp., Delco Remy Div.* (SD Ind) 684 F Supp 220.

In a prosecution for first-degree murder, the trial court properly denied defendant's motion in limine seeking a ruling that all evidence relating to defendant's association with a motorcycle club known as "The Outlaws" be excluded, since the trial judge was not in a position prior to trial to know the context in which the matter defendant sought to exclude would be presented, and defendant retained his right to object to such testimony when it was offered at trial. *State v Ruof*, 296 NC 623, 252 SE2d 720.

54. *Mason v State* (Ind) 539 NE2d 468; *Gendron v Pawtucket Mut. Ins. Co.* (Me) 409 A2d 656; *Manner v H.E.T., Inc.* (Mo App) 739 SW2d 724; *Amarillo Oil Co. v Energy-Agri Products, Inc.* (Tex App Amarillo) 731 SW2d 113, writ granted (Tex) 30 Tex Sup Ct Jour 621 and revd (Tex) 32 Tex Sup Ct Jour 252, op withdrawn, substituted op, on reh, reh gr, in part, reh of cause overr, in part (Tex) 794 SW2d 20; *Tempo Tamers, Inc. v Crow-Houston Four, Ltd.* (Tex App Dallas) 715 SW2d 658, 69 ALR4th 337, writ ref n re (Oct 15,

1986) and reh of writ of error overr (Dec 3, 1986).

A denial of a motion in limine cannot in and of itself constitute reversible error. *Lussier v Mau-Van Dev., Inc.*, 4 Hawaii App 359, 667 P2d 804; *State v Garrett* (Iowa) 183 NW2d 652; *Bifano v Young* (Tex App Corpus Christi) 665 SW2d 536.

55. *Huls v State*, 27 Ark App 242, 770 SW2d 160, post-conviction proceeding 301 Ark 572, 785 SW2d 467; *Mason v State* (Ind) 539 NE2d 468; *Krosky v Ohio Edison Co.* (Lorain Co) 20 Ohio App 3d 10, 20 Ohio BR 10, 484 NE2d 704, motion overr (disapproved on other grounds by *Crislip v TCH Liquidating Co.*, 52 Ohio St 3d 251, 556 NE2d 1177, CCH Prod Liab Rep ¶ 12606).

56. *Beghtol v Michael*, 80 Md App 387, 564 A2d 82, cert den 318 Md 514, 569 A2d 643 (objection held too broad); *Commonwealth v Laskaris*, 385 Pa Super 339, 561 A2d 16, app den (Pa) 577 A2d 889; *Wilkins v Royal Indem. Co.* (Tex Civ App Tyler) 592 SW2d 64 (plaintiff's objection that questioning was "immaterial and irrelevant" was too general to preserve issue on appeal).

57. *Hendrix v Raybestos-Manhattan, Inc.* (CA11 Ga) 776 F2d 1492, CCH Prod Liab Rep ¶ 10890, 19 Fed Rules Evid Serv 903, 3 FR Serv 3d 1169; *Moore v General Motors Corp., Delco Remy Div.* (SD Ind) 684 F Supp 220; *Banner Welders, Inc. v Knighton* (Ala) 425 So 2d 441, CCH Prod Liab Rep ¶ 9513; *Cruz v Union P. R. Co.* (Colo App) 707 P2d 360; *Swan v Florida Farm Bureau Ins. Co.* (Fla App D5) 404 So 2d 802; *Romanek-Golub & Co. v Anvan Hotel Corp.* (1st Dist) 168 Ill App 3d 1031, 119 Ill Dec 482, 522 NE2d 1341; *Mason v State* (Ind) 539 NE2d 468; *Brown v Terre Haute Regional Hospital* (Ind App) 537 NE2d 54; *Vorthman v Keith E. Myers Enterprises* (Iowa) 296 NW2d 772, 30 UCCRS 924, 14 ALR4th 1085 (superseded by statute on other grounds as stated in *Iowa State Commerce Com. v Manilla Grain Terminal, Inc.* (Iowa) 362 NW2d 562); *Simpson v Smith* (Mo App) 771 SW2d 368; *Sooter v Magic Lantern, Inc.* (Mo App) 771 SW2d 359; *Zehner v Post Oak Oil Co.* (Okla App) 640 P2d 991, 72 OGR 555; *Amarillo Oil Co. v Energy-Agri Products, Inc.* (Tex App Amarillo) 731 SW2d 113, writ granted (Tex) 30 Tex Sup Ct Jour 621 and revd (Tex) 32 Tex Sup Ct Jour 252, op with-

motion and admits the questionable evidence, the party who made the motion in limine ordinarily must object at the time the evidence is actually offered to preserve his objection for appellate review, because a motion in limine is not the equivalent of a continuing,⁵⁸ a standing,⁵⁹ or a contemporaneous⁶⁰ objection.

Observation: Some courts, taking a contrary view, have held that an adverse ruling on a motion in limine is sufficient to preserve the matter for appeal without the necessity for renewed or repeated objections during trial.⁶¹ And the federal courts have not reached uniform conclusions on the issue whether an objection is required.⁶²

In a criminal case, the Supreme Court has held that a defendant must testify at trial in order to be entitled to appellate review of the trial court's in limine ruling denying his motion to forbid the use of a prior conviction to impeach his credibility.⁶³

Observation: A trial court's ruling denying a motion in limine only goes to the admissibility of the evidence, not its weight, which is to be determined by the jury.⁶⁴

§ 113. Procedure in event of grant of motion

Granting a motion in limine will not, in and of itself, constitute reversible error.⁶⁵ If the motion was granted, the nonmoving party must make an offer of

drawn, substituted op, on reh, reh gr, in part, reh of cause overr, in part (Tex) 794 SW2d 20.

Where motion to exclude failed to sufficiently describe evidence and court was given no memorandum as to admissibility question, court acted within its discretion in denying motion and advising plaintiff to object when evidence was offered, at which time court would be in position to rule on admissibility, and plaintiff was not relieved of duty to object at trial. *Fenimore v Donald M. Drake Constr. Co.*, 87 Wash 2d 85, 549 P2d 483.

Observation: It has been noted that motions in limine are frequently made in the abstract and in anticipation of some hypothetical circumstance that may not develop at trial. Thus, a party whose motion in limine has been overruled must object when the error he sought to prevent with his motion is about to occur at trial. This will give the trial court an opportunity to reconsider the grounds of the motion in light of the actual—instead of hypothetical—circumstances at trial. *Hendrix v Raybestos-Manhattan, Inc.* (CA11 Ga) 776 F2d 1492, CCH Prod Liab Rep ¶ 10890, 19 Fed Rules Evid Serv 903, 3 FR Serv 3d 1169.

Annotations: Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311 § 5.

Practice References: 20 Am Jur Trials 441, Motion in Limine Practice § 69.

58. *Beghtol v Michael*, 80 Md App 387, 564 A2d 82, cert den 318 Md 514, 569 A2d 643.

59. *Gammon v Clark Equipment Co.*, 38 Wash App 274, 686 P2d 1102, affd, remanded, en banc 104 Wash 2d 613, 707 P2d 685.

60. Requirement of contemporaneous objection was not obviated by denial of defendants' pretrial motion in limine. *Romanek-Golub & Co. v Anvan Hotel Corp.* (1st Dist) 168 Ill App 3d 1031, 119 Ill Dec 482, 522 NE2d 1341.

61. *Schichtl v Slack*, 293 Ark 281, 737 SW2d 628; *Davidson v Beco Corp.*, 112 Idaho 560, 733 P2d 781, affd 114 Idaho 107, 753 P2d 1253, later app (App) 116 Idaho 696, 778 P2d 818; *State v O'Connell* (Iowa) 275 NW2d 197; *State v Borchardt*, 224 Neb 47, 395 NW2d 551.

62. § 114.

63. *Luce v United States*, 469 US 38, 83 L Ed 2d 443, 105 S Ct 460, 16 Fed Rules Evid Serv 833 (not followed by *State v McClure*, 298 Or 336, 692 P2d 579) and (not followed by *State v Whitehead*, 104 NJ 353, 517 A2d 373) and (not followed by *Commonwealth v Feroli*, 407 Mass 405, 553 NE2d 934).

64. *People v Bocclair*, 129 Ill 2d 458, 136 Ill Dec 29, 544 NE2d 715.

65. *Bobo v State* (Tex App Houston (14th Dist)) 757 SW2d 58, petition for discretionary review ref (Dec 21, 1988) and motion for rehearing on PDR denied (Jan 18, 1989) and

proof at trial of any fact that such party wishes to submit to the jury.⁶⁶ Such offer of proof should be made out of the jury's hearing.⁶⁷

■■■ Observation: There is some authority, however, taking the view that where a motion in limine has been granted, for the nonmoving party to further pursue the very course of action he is restrained from pursuing is itself violative of the court's ruling and thus such pursuit is not required to preserve for review the trial court's action.⁶⁸ And where a motion in limine is resolved in such a way that it is beyond question whether the challenged evidence would be admitted during trial, there is no reason for defense counsel to voice an objection during trial, and the matter is preserved for appeal.⁶⁹

§ 114. Federal court practice

The federal courts do not appear to be agreed on whether a pretrial motion is sufficient to preserve an objection for review. Although a few federal rules appear relevant, on the whole the rules have not provided an unambiguous answer. On the one hand, Rule 103 of the Federal Rules of Evidence,⁷⁰ provides, inter alia, that error may not be predicated on a ruling admitting evidence unless there has been a "timely" objection or motion to strike. On the other hand, both Rule 46, Federal Rules of Civil Procedure,⁷¹ and Rule 51, Federal Rules of Criminal Procedure,⁷² while not literally inconsistent with the terms of Rule 103, seem to incline against formality with respect to preserving for appeal an objection to evidence.

Thus, not surprisingly, the federal courts have not reached uniform conclusions on the issue. Some courts have held generally that such a motion makes

cert den 490 US 1066, 104 L Ed 2d 631, 109 S Ct 2066; *Bifano v Young* (Tex App Corpus Christi) 665 SW2d 536; *Union Carbide Corp. v Burton* (Tex Civ App Houston (14th Dist)) 618 SW2d 410, writ ref n re (Nov 4, 1981) and reh of writ of error overr (Dec 9, 1981).

66. *Gaston v Hunter* (App) 121 Ariz 33, 588 P2d 326; *Bud Wolf Chevrolet, Inc. v Robertson* (Ind App) 496 NE2d 771, different results reached on reh (Ind App) 508 NE2d 567, adopted, in part, vacated, in part (Ind) 519 NE2d 135; *Frerichs v Nebraska Harvestore Systems, Inc.*, 226 Neb 220, 410 NW2d 487, 4 UCCRS2d 763; *State v Grubb*, 28 Ohio St 3d 199, 28 Ohio BR 285, 503 NE2d 142; *State v Crouse* (Montgomery Co) 39 Ohio App 3d 18, 528 NE2d 1283, motion overr; *Braden v Hendricks* (Okla) 695 P2d 1343, CCH Prod Liab Rep ¶ 10394; *Norman v State* (Tex Crim) 523 SW2d 669, cert den 423 US 930, 46 L Ed 2d 259, 96 S Ct 280.

After the grant of a motion, to preserve error, the opposing party must reoffer the suppressed evidence at the trial, and the trial judge's determination is then reviewable by appeal. *Reveal v West* (Tex App Houston (1st Dist)) 764 SW2d 8, further holding that mandamus review is inappropriate because mandamus issues only when there is no adequate remedy by appeal.

Annotations: Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311 § 6.

Practice References: 20 Am Jur Trials 441, Motion in Limine Practice § 68.

67. *Braden v Hendricks* (Okla) 695 P2d 1343, CCH Prod Liab Rep ¶ 10394; *Union Carbide Corp. v Burton* (Tex Civ App Houston (14th Dist)) 618 SW2d 410, writ ref n re (Nov 4, 1981) and reh of writ of error overr (Dec 9, 1981).

68. *Baxter v Surgical Clinic of Anniston, P.A.* (Ala) 495 So 2d 652; *Panos v Department of Transp.*, 162 Ga App 53, 290 SE2d 295; *Prout v State*, 311 Md 348, 535 A2d 445.

69. *State v Miller* (Iowa) 229 NW2d 762.

70. FRE 103, discussed generally in 32B Am Jur 2d, Federal Rules of Evidence § 15.

71. FRCP 46, discussed generally in 32B Am Jur 2d, Federal Rules of Evidence §§ 15, 16; Federal Procedure, L Ed, Trial §§ 77:1 et seq.

72. FRCrP 51, discussed generally in 32B Am Jur 2d, Federal Rules of Evidence § 15; Federal Procedure, L Ed, Criminal Procedure §§ 22:1 et seq.

an objection at trial unnecessary,⁷³ while others have found under particular circumstances that a motion in limine was not sufficient to preserve the movant's objection to the evidence.⁷⁴ For example, in the situation wherein a court's pretrial ruling caused the disappointed party to change strategy and become the proponent of the allegedly objectionable evidence at trial, the courts have most often found that the party's initial objection to the evidence was waived,⁷⁵ although some courts have come to the contrary conclusion, reasoning that the objector had no other practical choice under the circumstances.⁷⁶

■■■ Observation: The opinions in the Fifth Circuit seem to reflect the disagreement among the federal courts at large. In at least one case the Court of Appeals held that a pretrial motion is, as a rule, sufficient.⁷⁷ In other cases, however, this rule apparently was not followed.⁷⁸

C. SEVERANCE AND SEPARATE TRIAL [§§ 115–179]

Research References

FRCP 20(b), 21, 42

FRCrP 8(b), 14

Unif R Crim P 472, 473

73. American Home Assur. Co. v Sunshine Supermarket, Inc. (CA3 VI) 753 F2d 321, 19 Fed Rules Evid Serv 374, 76 ALR Fed 605 (disagreed with by Doty v Sewall (CA1 Mass) 908 F2d 1053, 134 BNA LRRM 2746, 116 CCH LC ¶ 10250, 30 Fed Rules Evid Serv 777) and (disagreed with by McEwen v Norman (CA10 Okla) 926 F2d 1539); Sheehy v Southern Pacific Transp. Co. (CA9 Cal) 631 F2d 649, 7 Fed Rules Evid Serv 99 (disagreed with by Savoie v Otto Candies, Inc. (CA5 La) 692 F2d 363, 1985 AMC 220, 12 Fed Rules Evid Serv 269) and (disagreed with by Saglimbene v Venture Industries Corp. (CA6) 1990 US App LEXIS 2027) and (disagreed with by Doty v Sewall (CA1 Mass) 908 F2d 1053, 134 BNA LRRM 2746, 116 CCH LC ¶ 10250, 30 Fed Rules Evid Serv 777); United States v Alvarez (CA5 Tex) 584 F2d 694.

Annotations: Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial, 76 ALR Fed 619 §§ 3, 5.

74. United States v Johnson (CA8 Minn) 720 F2d 519, 14 Fed Rules Evid Serv 720, cert den 465 US 1036, 79 L Ed 2d 707, 104 S Ct 1310; Northwestern Flyers, Inc. v Olson Bros. Mfg. Co. (CA8 Iowa) 679 F2d 1264, 34 UCCRS 90 (disagreed with by Palmerin v Riverside (CA9 Cal) 794 F2d 1409, 21 Fed Rules Evid Serv 1 (disagreed with by McEwen v Norman (CA10 Okla) 926 F2d 1539)); Collins v Wayne Corp. (CA5 Tex) 621 F2d 777, CCH Prod Liab Rep ¶ 8818, 6 Fed Rules Evid Serv 498 (disagreed with by Sherrod v Berry (CA7 Ill) 827 F2d 195, 23 Fed Rules Evid Serv 708, reh gr, vacated,

en banc (CA7 Ill) 835 F2d 1222, on reh, en banc (CA7 Ill) 856 F2d 802, 26 Fed Rules Evid Serv 875 and (disagreed with by Saglimbene v Venture Industries Corp. (CA6) 1990 US App LEXIS 2027)).

Annotations: 76 ALR Fed 619 §§ 3, 4[b], 5.

75. United States v Johnson (CA8 Minn) 720 F2d 519, 14 Fed Rules Evid Serv 720, cert den 465 US 1036, 79 L Ed 2d 707, 104 S Ct 1310.

76. Reyes v Missouri P.R. Co. (CA5 Tex) 589 F2d 791, 3 Fed Rules Evid Serv 864; United States v Muscato (ED NY) 534 F Supp 969, 10 Fed Rules Evid Serv 234.

77. United States v Alvarez (CA5 Tex) 584 F2d 694.

Annotations: 76 ALR Fed 619 § 5.

78. Rojas v Richardson (CA5 Tex) 703 F2d 186, 13 Fed Rules Evid Serv 66, on reh (CA5 Tex) 713 F2d 116, 13 Fed Rules Evid Serv 1646, reh den (CA5 Tex) 718 F2d 1096 and (disagreed with by Palmerin v Riverside (CA9 Cal) 794 F2d 1409, 21 Fed Rules Evid Serv 1 (disagreed with by McEwen v Norman (CA10 Okla) 926 F2d 1539)); Collins v Wayne Corp. (CA5 Tex) 621 F2d 777, CCH Prod Liab Rep ¶ 8818, 6 Fed Rules Evid Serv 498 (disagreed with by Sherrod v Berry (CA7 Ill) 827 F2d 195, 23 Fed Rules Evid Serv 708, reh gr, vacated, en banc (CA7 Ill) 835 F2d 1222, on reh, en banc (CA7 Ill) 856 F2d 802, 26 Fed Rules Evid Serv 875 and (disagreed with by Saglimbene v Venture Industries Corp. (CA6) 1990 US App LEXIS 2027)).

Annotations: 76 ALR Fed 619 § 5.

ALR Digest to 3d, 4th, and Federal, Criminal Law § 108; Trial § 4

Index to Annotations, Joint and Separate Trial; Severance of Action; Trial

1 Am Jur Pl & Pr Forms (Rev), Actions, Forms 41 et seq.; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Forms 111 et seq.; 11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 1551 et seq.; 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 41 et seq.

1 Federal Procedural Forms, L Ed §§ 1:1477-1:1483

5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases §§ 53-56

Bailey & Rothblatt, Successful Techniques for Criminal Trials (2d ed, 1985), §§ 5:1 et seq.

Charfoos & Christensen, Personal Injury Practice § 12:7

Danner & Toothman, Trial Practice Checklists (1989) §§ 4:60(B), 7:20(B), 8:60

1. IN GENERAL [§§ 115-151]

a. DEFINITIONS AND DISTINCTIONS; POWER AND DISCRETION OF COURT [§§ 115-121]

§ 115. Definitions and distinctions

There is much confusion between the terms “separate trial” and “severance,” and they are consistently misused by both bench and bar. However, a significant distinction exists between them. A severance divides a lawsuit into two or more independent causes, each of which results in a separate, final, and enforceable judgment, while separate trials usually result in one judgment.⁷⁹ The label “severance” is not always determinative; the substance of the court’s action, not its form, controls.⁸⁰

■■■ Observation: Since a severance divides the law suit into two or more separate independent causes, a judgment which disposes of all parties and issues in one of the severed causes is final and appealable. On the other hand, an order for a separate trial leaves the law suit intact, but enables the court to hear and determine one or more issues without trying all controverted issues at the same hearing. The order entered at the conclusion of a separate trial is often interlocutory, since no final and appealable judgment can properly be rendered until all controlling issues have been tried and decided.⁸¹

“Bifurcated trials” are trials in which only some of the issues of the case will be resolved at one trial, with the rest left for a further trial or other proceedings.⁸² Bifurcation occurs frequently with respect to the issues of liability and damages.⁸³

§ 116. Preference for single trial

The policy of the law is to try all issues arising out of the same occurrence

79. Opinion of Clerk, Supreme Court (Ala) 526 So 2d 584; Ex parte Palughi (Ala) 494 So 2d 404; Hall v Austin (Tex) 450 SW2d 836; Perma Stone-Surfa Shield Co. v Merideth (Tex App San Antonio) 752 SW2d 224.

80. Ex parte Palughi (Ala) 494 So 2d 404.

81. Hall v Austin (Tex) 450 SW2d 836.

82. **Practice References:** Danner & Toothman, Trial Practice Checklists (1989) § 8:60.

83. § 140.

or series of occurrences together,⁸⁴ because the interests of justice and judicial economy are better served with joint trials wherever possible.⁸⁵ In other words, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one.⁸⁶ Consequently, parties to an action must present all their evidence upon all issues pending, and cannot, as a matter of right, have a trial divided,⁸⁷ and there is no abuse of discretion by the trial court in trying all issues in a single trial, under appropriate instructions.⁸⁸

The party opposing a motion for joint trial has the burden to demonstrate that prejudice to a substantial right would result from a joint trial.⁸⁹

§ 117. Statutes and court rules; FRCP 42(b)

Often state statutes and court procedural rules specifically authorize trial courts in their discretion to order one or more issues to be separately tried prior to the trial of other issues.⁹⁰ Many of these statutes and rules are

84. *Bhagvandoss v Beiersdorf, Inc.* (Mo) 723 SW2d 392, CCH Prod Liab Rep ¶ 11232; *Carlson v Cain*, 216 Mont 129, 700 P2d 607.

Ordinarily, bifurcation for the purpose of permitting the jury to consider separate issues at separate times is not favored when all of the issues have been presented in a single trial. *Johnson v Horne* (Ala) 500 So 2d 1024.

The law disfavors splitting causes of action or conducting separate trials between the same parties in different localities. *United Nuclear Corp. v Fort* (App) 102 NM 756, 700 P2d 1005.

85. *Mideal Homes Corp. v L & C Concrete Work, Inc.* (2d Dept) 90 App Div 2d 789, 455 NYS2d 394.

Separate trials of the same issues and facts are generally a waste of time and money, and should be avoided if possible. *Wall v Hodges* (Ala) 465 So 2d 359 (consolidation of will contests).

Multiplicity of suits does not promote substantial justice. *Haas v Freeman*, 236 Kan 677, 693 P2d 1199.

When actions share material questions of law or fact, the interests of judicial economy are better served by a joint trial whenever possible. *Import Alley of Mid-Island, Inc. v Mid-Island Shopping Plaza, Inc.* (2d Dept) 103 App Div 2d 797, 477 NYS2d 675.

86. *Shanley v Callanan Industries, Inc.*, 54 NY2d 52, 444 NYS2d 585, 429 NE2d 104.

87. *Miller v American Bonding Co.*, 257 US 304, 66 L Ed 250, 42 S Ct 98; *Waylander-Peterson Co. v Great N.R. Co.* (CA8 Minn) 201 F2d 408, 37 ALR2d 1399; *Winters v Floyd*, 51 Tenn App 298, 367 SW2d 288, 4 ALR3d 450;

Edward F. Gerber Co. v Thompson, 84 W Va 721, 100 SE 733, 7 ALR 730.

As to severance of misjoined causes of action, see 1 Am Jur 2d, Actions § 103.

As to consolidation of actions, see 1 Am Jur 2d, Actions §§ 156 et seq.

88. *Bhagvandoss v Beiersdorf, Inc.* (Mo) 723 SW2d 392, CCH Prod Liab Rep ¶ 11232.

See also *Dobos v Driscoll*, 404 Mass 634, 537 NE2d 558, cert den (US) 107 L Ed 2d 107, 110 S Ct 149, holding that defendant was not prejudiced by refusal of the court to grant separate trial where the judge gave cautionary instructions and there was nothing to show that the jury did not abide by such instructions.

89. *Mars Associates, Inc. v New York City Educational Constr. Fund* (1st Dept) 126 App Div 2d 178, 513 NYS2d 125, app dismd without op 70 NY2d 747, 519 NYS2d 1033, 514 NE2d 391 (holding that the party requesting separate trial had meritoriously met its burden of proving that it was prejudiced by the joint trials of the actions, and that there should have been a separate trial of each one of the actions); *Chiacchia v National Westminster Bank* (2d Dept) 124 App Div 2d 626, 507 NYS2d 888.

90. *Wien Air Alaska v Bubbel* (Alaska) 723 P2d 627; *Linday v American President Lines, Ltd.* (1st Dist) 214 Cal App 2d 146, 29 Cal Rptr 465, 5 ALR3d 866; *Gaede v District Court of Eighth Judicial Dist.* (Colo) 676 P2d 1186; *Bowen v Manuel* (Fla App D2) 144 So 2d 341; *Walraven v Martin*, 123 Mich App 342, 333 NW2d 569, 40 ALR4th 619; *Osmak v American Car & Foundry Co.*, 328 Mo 159, 40 SW2d 714, 77 ALR 722; *Tindall v Konitz Contracting, Inc.*, 240 Mont 345, 783 P2d 1376; *Re Will of Hester*, 320 NC 738, 360 SE2d 801, reh

patterned after Rule 42(b) of the Federal Rules of Civil Procedure, which provides that the court may order a separate trial of any claim, cross claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third-party claims, or issues.⁹¹

■■■■ Observation: FRCP 42(b) has been held to be a valid regulation of procedure.⁹² It has been noted that rules permitting separate trials counterbalance in large measure the broad joinder provisions existing in most jurisdictions,⁹³ as well as in the same Federal Rule governing separate trials.⁹⁴

It has been said that one purpose of FRCP 42(b) is to permit the deferral of costly and possibly unnecessary discovery proceedings pending the resolution of potentially dispositive preliminary issues,⁹⁵ although the validity of the trial court's call for limited trial under this rule is not dependent on the actual conclusion of the entire case on that single issue.⁹⁶ Other purposes of or grounds for separate trial under FRCP 42(b) include prevention of prejudice to the rights of the parties, avoidance of confusion to the jury, and relative convenience and judicial economy.⁹⁷ Still, it is said that separate trials should not be ordered unless clearly necessary.⁹⁸ And Rule 42(b) should not be applied to implement a proposed piecemeal litigation strategy.⁹⁹

den 321 NC 300, 362 SE2d 780; *Slusher v Ospital* (Utah) 777 P2d 437, 111 Utah Adv Rep 18; *Bennett v Warner* (W Va) 372 SE2d 920.

91. FRCP 42(b).

Practice References: *Danner & Toothman*, Trial Practice Checklists (1989) § 8:60(B).

Forms: Motion—For severance of claim and separate trial [FRCP 42(b)]. 1 Federal Procedural Forms, L Ed § 1:1477.

—For order for separate trials [FRCP 42(b)]. 1 Federal Procedural Forms, L Ed § 1:1478.

—To sever third-party claim and for separate trial. 1 Federal Procedural Forms, L Ed § 1:1479.

—Order—Granting severance of actions for trial [FRCP 42(b)]. 1 Federal Procedural Forms, L Ed § 1:1480.

92. *Moss v Associated Transport, Inc.* (CA6 Tenn) 344 F2d 23, 9 FR Serv 2d 42b.12, Case 4.

93. **Practice References:** *Charfoos & Christensen*, *Personal Injury Practice: Technique and Technology* (1986) § 12:7.

94. FRCP 42(a).

95. *Ellingson Timber Co. v Great N.R. Co.* (CA9 Or) 424 F2d 497, 1970 CCH Trade Cases ¶ 73158, 14 FR Serv 2d 136, cert den 400 US 957, 27 L Ed 2d 265, 91 S Ct 354.

96. *Rossano v Blue Plate Foods, Inc.* (CA5 Ga) 314 F2d 174, 6 FR Serv 2d 877, 6 FR Serv 2d 886, cert den 375 US 866, 11 L Ed 2d 93, 84 S Ct 139, stating that there is never a requirement that the court's recognition of

serious issues before trial be ultimately resolved after such trial in favor of the party who first suggested the existence of the issue; it is enough that there be on the record at the time a substantial issue of fact which, if determined in favor of defendant, will eliminate expense for all concerned without prejudicing the rights of the parties.

97. *Re Beverly Hills Fire Litigation* (CA6 Ky) 695 F2d 207, cert den 461 US 929, 77 L Ed 2d 300, 103 S Ct 2090 and on remand (ED Ky) 583 F Supp 1163, ctfd ques ans (Ky) 672 SW2d 922, later proceeding (ED Ky) 639 F Supp 915; *Manufacturers Bank & Trust Co. v Transamerica Ins. Co.* (ED Mo) 568 F Supp 790; *Rollins v Sears, Roebuck & Co.* (ED La) 71 FRD 540, 21 FR Serv 2d 1088; *Lo Cicero v Humble Oil & Refining Co.* (ED La) 52 FRD 28, 1971 CCH Trade Cases ¶ 73486, 14 FR Serv 2d 1305, 12 ALR Fed 826.

Rule 42(b) permits bifurcation to avoid prejudice, not to create it. *United States Gypsum Co. v Schiavo Bros., Inc.* (CA3 Pa) 668 F2d 172, 32 FR Serv 2d 1419, cert den 456 US 961, 72 L Ed 2d 485, 102 S Ct 2038.

98. *Intersong-USA, Inc. v CBS, Inc.* (SD NY) 1 FR Serv 3d 609.

99. *United States v Mottolo* (DC NH) 107 FRD 267, summary judgment gr, in part, summary judgment den, in part (DC NH) 695 F Supp 615, 19 ELR 20442, later proceeding (DC NH) 1990 US Dist LEXIS 18590 and (disapproved by *Joslyn Mfg. Co. v T.L. James & Co.* (CA5 La) 893 F2d 80, 20 ELR 20382, reh den (CA5) 1990 US App LEXIS 6373, later

A federal court's jurisdiction over the entire case, both federal and nonfederal issues, is unaffected by a separate trial of the nonfederal issue.¹

The Uniform Rules of Criminal Procedure contain provisions for severance of offenses upon motion of the prosecuting attorney or defendant² or upon the court's own motion.³

§ 118. —Relationship of FRCP 42(b) to other Rules and statutory provisions

It is said that nothing in FRCP 42(b), so far as it may be applicable in suits brought in District Courts under the Tucker Act (28 USCS §§ 1346(a), 1491), authorizes the maintenance of any suit against the United States to which it has not otherwise consented.⁴

The entry of a final judgment is required under FRCP 54(b), rather than merely setting aside the remaining counterclaims and cross claims for separate trial under FRCP 42(b), when there is an express determination that there is no just reason for delay for the granting of final judgment, unless the remaining counterclaims and cross claims are severed pursuant to FRCP 21.⁵

FRCP 42(b) does not prevent the use of FRCP 68 relative to offers to confess judgment.⁶

Courts have noted that an order for a separate trial under FRCP 42(b) is to be distinguished from an order for severance under FRCP 21,⁷ but it has also been noted that courts frequently use the terms severance and separate trial without maintaining this distinction.⁸

§ 119. —Right to jury trial

FRCP 42(b) commands that a court must, in granting a separate trial, always preserve inviolate the right of trial by jury as declared by the Seventh Amendment of the Constitution, or as given by a statute of the United States. Thus, where equitable and legal issues are joined in the same action, there is a right to a jury trial on the legal issues, which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of the common issues existing between the claims.⁹ In other words, separate trials of separate issues before different juries does not constitute a violation

proceeding (US) 112 L Ed 2d 11, 111 S Ct 34 and cert den (US) 112 L Ed 2d 1098, 111 S Ct 1017).

1. *Richmond v Weiner* (CA9 Cal) 353 F2d 41, 147 USPQ 8, 9 FR Serv 2d 42b.12, Case 5, cert den 384 US 928, 16 L Ed 2d 531, 86 S Ct 1447, 149 USPQ 906, reh den 384 US 994, 16 L Ed 2d 1011, 86 S Ct 1885.

2. *Unif R Crim P* 472.

3. *Unif R Crim P* 473.

4. *United States v Sherwood*, 312 US 584, 85 L Ed 1058, 61 S Ct 767.

5. *Hebel v Ebersole* (CA7 Ill) 543 F2d 14, 22 FR Serv 2d 1122, 20 UCCRS 965.

6. *Cover v Chicago Eye Shield Co.* (CA7 Ill) 136 F2d 374, 58 USPQ 462, cert den 320 US 749, 88 L Ed 445, 64 S Ct 53, 59 USPQ 495, reh den 320 US 812, 88 L Ed 490, 64 S Ct 87.

7. *Re Plumbing Fixture Cases* (Jud Pan Mult Lit) 298 F Supp 484, 1968 CCH Trade Cases ¶ 72671.

Generally as to such distinction, see § 117.

8. *Pearl Brewing Co. v Jos. Schlitz Brewing Co.* (SD Tex) 415 F Supp 1122, 1976-2 CCH Trade Cases ¶ 61169, 21 FR Serv 2d 979.

9. *Ross v Bernhard*, 396 US 531, 24 L Ed 2d 729, 90 S Ct 733, CCH Fed Secur L Rep ¶ 92566, 13 FR Serv 2d 1042.

of the constitutional right to trial by jury.¹⁰ And the ordering of separate trials on the issues of liability and damages does not violate the Seventh Amendment to the Constitution, so long as the issues are separate and distinct and may be heard alone without injustice.¹¹ Separate trials only violate the Seventh Amendment when they involve *both* overlapping issues and different juries.¹²

A trial court is not justified under FRCP 42(b) in directing that issues raised in the complaint be tried by the court before a jury determination of the validity of charges made in the counterclaim and cross claim, when by doing so it would deprive the defendant of a full jury trial on its counterclaim.¹³ Where a separate trial is ordered on the issue of the validity of a release pleaded by the defendant as a defense to a tort action, and the release is attacked by the plaintiff as being invalid because of fraud, the plaintiff is entitled to a jury trial on the issue and the denial thereof by the court is reversible error.¹⁴

■■■■ Observation: Although the FRCP 42(b) provision as to the inviolate right of trial by jury may be missing from an otherwise parallel state procedure rule on separate trials, it has been said that there should be no difference in result under the state rule when an order for separate trial is considered.¹⁵

§ 120. Power and discretion of court in general

While there is no constitutional guaranty to a single, nonbifurcated trial,¹⁶ it is also held that a litigant has no right to a bifurcation of the issues.¹⁷ Thus, it is generally recognized that the decision whether to separate claims or issues in a proceeding is within the sound discretion of the trial court.¹⁸ It is equally

10. *Swofford v B & W, Inc.* (SD Tex) 34 FRD 15, 139 USPQ 92, 7 FR Serv 2d 806, *affd* (CA5 Tex) 336 F2d 406, 142 USPQ 291, 8 FR Serv 2d 38a.3, Case 1, cert den 379 US 962, 13 L Ed 2d 557, 85 S Ct 653, 144 USPQ 780.

11. *Arthur Young & Co. v United States Dist. Court* (CA9 Cal) 549 F2d 686, CCH Fed Secur L Rep ¶ 95925, 23 FR Serv 2d 98, cert den 434 US 829, 54 L Ed 2d 88, 98 S Ct 109; *Re Master Key Antitrust Litigation* (DC Conn) 70 FRD 23, 1975-1 CCH Trade Cases ¶ 60377, 20 FR Serv 2d 619, *app dismd* (CA2 Conn) 528 F2d 5, 1975-2 CCH Trade Cases ¶ 60648, 21 FR Serv 2d 276.

Generally as to separate trial of the issues of liability and damages, see § 140.

12. *Paine, Webber, Jackson & Curtis, Inc. v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (DC Del) 587 F Supp 1112, 223 USPQ 888, 38 FR Serv 2d 1070, 79 ALR Fed 521.

There is no constitutional problem in ordering the separate trial of the issues with the same jury to sit in each trial, such as where the jury trial is bifurcated on the issues of damages and liability, and in fact this is the preferred practice. *Martin v Bell Helicopter Co.* (DC Colo) 85 FRD 654, 32 FR Serv 2d 354.

13. *Beacon Theatres, Inc. v Westover*, 359 US

500, 3 L Ed 2d 988, 79 S Ct 948, 2 FR Serv 2d 650.

14. *Bowie v Sorrell* (CA4 Va) 209 F2d 49, 43 ALR2d 781.

For general discussion of separate trial on the issue of the validity of a release, see § 146.

15. *State ex rel. Fitzgerald v District Court of Eighth Judicial Dist.*, 217 Mont 106, 703 P2d 148.

16. *Panas v Harakis*, 129 NH 591, 529 A2d 976; *Ennix v Clay* (Tenn) 703 SW2d 137.

17. *Ennix v Clay* (Tenn) 703 SW2d 137.

18. *Ex parte R.B. Ethridge & Associates, Inc.* (Ala) 494 So 2d 54; *Wien Air Alaska v Bubbell* (Alaska) 723 P2d 627; *Morley v Superior Court of Arizona*, 131 Ariz 85, 638 P2d 1331, 27 ALR4th 575; *Downey Savings & Loan Assn. v Ohio Casualty Ins. Co.* (2nd Dist) 189 Cal App 3d 1072, 234 Cal Rptr 835, cert den 486 US 1036, 100 L Ed 2d 610, 108 S Ct 2023; *Gaede v District Court of Eighth Judicial Dist.* (Colo) 676 P2d 1186; *Swenson v Sawoska*, 18 Conn App 597, 559 A2d 1153, *app gr*, in part 212 Conn 810, 564 A2d 1073 and *affd* 215 Conn 148, 575 A2d 206; *McNally v Eckman* (Del Sup) 466 A2d 363, later proceeding (CA3 Del) 815 F2d 254, later proceeding (Del Super)

well settled that the granting or denying of a separate trial on an issue under FRCP 42(b) is within the sound discretion of the trial court,¹⁹ to prevent prejudice and to expedite a fair decision on the merits of a case.²⁰

However, while the trial court has discretion with regard to ordering a separate trial, it is frequently stated that such discretion should be used cautiously²¹ and sparingly,²² confined to special circumstances²³ or the most exceptional cases,²⁴ and on a strong showing of necessity.²⁵ In other words, it should be the exception rather than the rule.²⁶ It has been also said that because a single trial tends to lessen the delay, expense, and inconvenience to all concerned, the court should not routinely resort to a separate trial.²⁷ Moreover, if the trial court is inclined to bifurcate, it should use measures to eliminate or effectively minimize the hazards of bifurcation—measures designed to maintain the status quo as concerns the financial affairs of the

1988 Del Super LEXIS 269; Hardee Mfg. Co. v Josey (Fla App D3) 535 So 2d 655, 14 FLW 15; Michaels v Kessler, 191 Ga App 103, 381 SE2d 103; Alt v Krueger, 4 Hawaii App 201, 663 P2d 1078 (disagreed with on other grounds by State v Rabe, 5 Hawaii App 251, 687 P2d 554); State v Schuetter (Ind App) 503 NE2d 418; Sparacello v Andrews (La App 1st Cir) 501 So 2d 269, cert den (La) 502 So 2d 103; McGarr v Baltimore Area Council, Boy Scouts, Inc., 74 Md App 127, 536 A2d 728, cert den 313 Md 7, 542 A2d 844; Dobos v Driscoll, 404 Mass 634, 537 NE2d 558, cert den (US) 107 L Ed 2d 107, 110 S Ct 149; Kubiak v Hurr, 143 Mich App 465, 372 NW2d 341; Hackman v Dandamudi (Mo App) 733 SW2d 452; Tindall v Konitz Contracting, Inc., 240 Mont 345, 783 P2d 1376; New Hampshire Ins. Group v Speer, 98 NM 50, 644 P2d 1039; Panas v Harakis, 129 NH 591, 529 A2d 976; Shanley v Callanan Industries, Inc., 54 NY2d 52, 444 NYS2d 585, 429 NE2d 104; Bumgarner v Tomblin, 92 NC App 571, 375 SE2d 520, review den 324 NC 333, 378 SE2d 789; Fairfield Commons Condominium Asso. v Stasa (Lucas Co) 30 Ohio App 3d 11, 30 Ohio BR 49, 506 NE2d 237, cert den 479 US 1055, 93 L Ed 2d 981, 107 S Ct 930; Faulkenberry v Kansas City S.R. Co. (Okla) 661 P2d 510, cert den 464 US 850, 78 L Ed 2d 146, 104 S Ct 159; Ecksel v Orleans Constr. Co., 360 Pa Super 119, 519 A2d 1021; Ennix v Clay (Tenn) 703 SW2d 137; Marshall v Harris (Tex App Houston (1st Dist)) 764 SW2d 34; Slusher v Ospital (Utah) 777 P2d 437, 111 Utah Adv Rep 18; Bennett v Warner (W Va) 372 SE2d 920.

Ordinarily, whether all or only a part of the issues shall be tried at one time, and which issue shall be tried first, are questions to be determined by the trial court. Miller v American Bonding Co., 257 US 304, 66 L Ed 250, 42 S Ct 98; McArthur v Shaffer, 59 Cal App 2d 724, 139 P2d 959; Wells v Wildin, 224 Iowa 913, 277 NW 308, 115 ALR 169.

As to the splitting or consolidation of causes of action, see 1 Am Jur 2d, Actions §§ 127 et seq. (splitting), 156 et seq. (consolidation).

19. Warner v Rossignol (CA1 Me) 513 F2d 678, later app (CA1 Me) 538 F2d 910; Garber v Randell (CA2 NY) 477 F2d 711, CCH Fed Secur L Rep ¶ 93931, 17 FR Serv 2d 4; Bedser v Horton Motor Lines, Inc. (CA4 Va) 122 F2d 406; Reines Distributors, Inc. v Admiral Corp. (SD NY) 257 F Supp 619, 1966 CCH Trade Cases ¶ 71640; Shepard v International Business Machines Corp. (SD NY) 45 FRD 536, 161 USPQ 102, 12 FR Serv 2d 1026; Hahn v Woodlyn Fire Co. (ED Pa) 32 FRD 429, 7 FR Serv 2d 870.

20. United States v International Business Machines Corp. (SD NY) 60 FRD 654, 1973-2 CCH Trade Cases ¶ 74613, 17 FR Serv 2d 1245; Cohen v District of Columbia Nat. Bank (DC Dist Col) 59 FRD 84, 16 FR Serv 2d 848.

21. Weasel v Weasel (Fla App D4) 419 So 2d 698.

22. Shanley v Callanan Industries, Inc., 54 NY2d 52, 444 NYS2d 585, 429 NE2d 104.

23. Faulkenberry v Kansas City S.R. Co. (Okla) 661 P2d 510, cert den 464 US 850, 78 L Ed 2d 146, 104 S Ct 159.

24. Weasel v Weasel (Fla App D4) 419 So 2d 698 (holding that an order bifurcating the issue of dissolution of a marriage and the remaining issues of alimony, property rights, etc., was an abuse of the trial court's discretion); Ennix v Clay (Tenn) 703 SW2d 137.

25. Ennix v Clay (Tenn) 703 SW2d 137.

26. Weasel v Weasel (Fla App D4) 419 So 2d 698.

27. Molinaro v Watkins—Johnson CEI Div. (DC Md) 60 FRD 410, 180 USPQ 237, 17 FR Serv 2d 1249.

parties and the other party's (and the court's) access to full relief in the ultimate final judgment.²⁸

§ 121. —Appellate review of trial court's decision

Although orders regarding bifurcation or separate trials are reviewable for abuse of discretion,²⁹ an appellate court will not reverse the trial court's decision in the absence of a clear showing of such abuse.³⁰ And this is equally true in federal courts.³¹ It is also held that there must be a showing of prejudice from the trial court's decision regarding bifurcation.³²

In some cases, it has been ruled on review that there was no abuse of discretion where the trial court ordered a severance or separate trial under the particular circumstances involved.³³ In other cases, however, the trial court was held to have abused its discretion in ordering separate trials.³⁴ Where the trial

28. *Weasel v Weasel* (Fla App D4) 419 So 2d 698.

29. *Bandai America, Inc. v Bally Midway Mfg. Co.* (CA3 NJ) 775 F2d 70, 227 USPQ 716, 1985-2 CCH Trade Cases ¶ 66829, cert den 475 US 1047, 89 L Ed 2d 574, 106 S Ct 1265.

30. *Ex parte R.B. Ethridge & Associates, Inc.* (Ala) 494 So 2d 54; *Wien Air Alaska v Bubb* (Alaska) 723 P2d 627; *Downey Savings & Loan Assn. v Ohio Casualty Ins. Co.* (2nd Dist) 189 Cal App 3d 1072, 234 Cal Rptr 835, cert den 486 US 1036, 100 L Ed 2d 610, 108 S Ct 2023; *Swenson v Sawoska*, 18 Conn App 597, 559 A2d 1153, app gr, in part 212 Conn 810, 564 A2d 1073 and affd 215 Conn 148, 575 A2d 206; *Hardee Mfg. Co. v Josey* (Fla App D3) 535 So 2d 655, 14 FLW 15; *Michaels v Kessler*, 191 Ga App 103, 381 SE2d 103; *Rueh v State*, 103 Idaho 74, 644 P2d 1333; *State v Schuetter* (Ind App) 503 NE2d 418; *Landry v Thibaut* (La App 5th Cir) 523 So 2d 1370, cert den (La) 526 So 2d 809 and cert den (La) 526 So 2d 809; *McGuire v C & L Restaurant, Inc.* (Minn) 346 NW2d 605; *Bhagvondoss v Beiersdorf, Inc.* (Mo) 723 SW2d 392, CCH Prod Liab Rep ¶ 11232; *Sharp v Sharp*, 84 NC App 128, 351 SE2d 799; *Miller v Presswood* (Tex App Beaumont) 743 SW2d 275, writ den (Apr 19, 1989); *Bennett v Warner* (W Va) 372 SE2d 920.

31. *Garber v Randell* (CA2 NY) 477 F2d 711, CCH Fed Secur L Rep ¶ 93931, 17 FR Serv 2d 4.

32. *Lis v Robert Packer Hospital* (CA3 Pa) 579 F2d 819, 3 Fed Rules Evid Serv 451, 25 FR Serv 2d 1108, cert den 439 US 955, 58 L Ed 2d 346, 99 S Ct 354; *Fetz v E & L Truck Rental Co.* (SD Ind) 670 F Supp 261.

33. *Hines v Joy Mfg. Co.* (CA6 Ky) 850 F2d 1146, CCH Prod Liab Rep ¶ 11842, 25 Fed Rules Evid Serv 1452, 11 FR Serv 3d 838 (bifurcating products liability case on issues of liability and damages, despite plaintiff's argument that extent of injury was relevant to question whether manufacturer was negligent

in putting its product on market, since plaintiff cited to no cases in which Kentucky has adopted this formula for liability); *Kosters v Seven-Up Co.* (CA6 Mich) 595 F2d 347 (granting separate trial for franchisor's third-party claim against bottler and carton manufacturer in action brought by purchaser of carton of soft drinks against soft-drink franchisor; court determined that presentation of case in joint trial would unduly complicate trial and lead to confusion because of issues of indemnity and contribution in products liability cases); *Bowie v Sorrell* (CA4 Va) 209 F2d 49, 43 ALR2d 781 (granting separate trial of issue of validity of release obtained by agent of defendant's insurer); *Kennedy v Hyde* (Tex App Fort Worth) 666 SW2d 325, writ granted (Tex) 27 Tex Sup Ct Jour 531 and revd on other grounds (Tex) 682 SW2d 525, reh overr (Jan 9, 1985) (ordering separate trial where court was faced with trial of complex lawsuit with multiple parties and claims, and trial of all issues would reasonably have required many witnesses and considerable period of time, whereas oral settlement agreement, if established, would have resolved case without necessity of prolonged trial on other issues).

34. *Beacon Theatres, Inc. v Westover*, 359 US 500, 3 L Ed 2d 988, 79 S Ct 948, 2 FR Serv 2d 650 (trial court ordered that issues raised in complaint be tried before court prior to jury determination of validity of charges of antitrust violations made in counterclaim and cross claim, with result that defendant was deprived of full jury trial on its counterclaim); *C.O. Regan, Inc. v Parsons, Brinckerhoff, Quade & Douglas* (CA4 Va) 411 F2d 1379 (trial court granted separate trials on the issues of liability and damages in actions by builder against engineering firm and another contractor, where damage could have been caused by factors over which three different agencies had partial or total responsibility, with result that split trials eliminated any quantitative judgment by jury as to amount of damage resulting from plaintiff's

court, sua sponte, bifurcated the issue of liability from the issue of damages on the morning that the trial commenced, creating significant procedural and tactical problems which weakened the presentation of appellants' case, it was held that the trial court abused its discretion.³⁵ And it would be an abuse of discretion to order separate trials of issues where the issues are interwoven and intertwined.³⁶ Conversely, it is not an abuse of discretion for the court to refuse to sever the case when it does not find two very separate, compartmentalized issues.³⁷

b. REQUISITES; FACTORS CONSIDERED [§§ 122-126]

§ 122. Ordering of severance or separate trial

There are certain requisites which limit a trial court's authority to require separate litigation of portions of a civil action. Those requisites are: (1) convenience, (2) avoidance of prejudice, or (3) promotion of expeditious or economical adjudication.³⁸ As the courts have variously stated, it is proper to order a separate trial if it would simplify or clarify the proceedings, permit a more orderly disposition of the case, reduce hardship to the parties, speed a just determination, or otherwise be in the interest of justice.³⁹

FRCP 42(b) clearly states that the court should consider the factors of prejudice,⁴⁰ convenience,⁴¹ and economy and expedition,⁴² in granting or

own conduct and the amount resulting from conduct of other agencies).

In suit by New Jersey resident in New Jersey court against Florida corporation for injuries in Florida, trial court misapplied doctrine of forum non conveniens by ordering issue of damages to be tried in New Jersey and issue of liability to be tried in Florida where no real hardship to defendant was shown. *Radigan v Innisbrook Resort & Golf Club*, 150 NJ Super 427, 375 A2d 1229.

35. *Bennett v Warner* (W Va) 372 SE2d 920. The appellate court noted that counsel's opening statement reflected confusion on his part as a result of the bifurcation; witnesses had to be called in a different order than that anticipated before the bifurcation, which was part of the cause of one important witness' inability to appear; and the jury had no opportunity to hear certain key evidence.

36. *Britton v Farmers Ins. Group* (Truck Ins. Exchange), 221 Mont 67, 721 P2d 303.

See also *People in interest of D.M.W.* (Colo App) 752 P2d 587, upholding juvenile court's denial of separate hearings on termination of mother's parental rights and father's parental rights where issues were necessarily interlocked but court, as trier of fact, would have no difficulty disregarding evidence which should not be considered against one party or the other.

37. *Vitner v Funk*, 182 Ga App 39, 354 SE2d 666.

38. *Ex parte Palughi* (Ala) 494 So 2d 404;

Wien Air Alaska v Bubbel (Alaska) 723 P2d 627; *Gaede v District Court of Eighth Judicial Dist.* (Colo) 676 P2d 1186; *People in interest of D.M.W.* (Colo App) 752 P2d 587; *Grosfield v Clearwater Clinic* (Minn) 417 NW2d 640; *Wolfner v Miller* (Mo App) 711 SW2d 580; *State ex rel. Fitzgerald v District Court of Eighth Judicial Dist.*, 217 Mont 106, 703 P2d 148; *Ennix v Clay* (Tenn) 703 SW2d 137; *Bennett v Warner* (W Va) 372 SE2d 920.

Practice References: *Danner & Toothman, Trial Practice Checklists* (1989) § 4:60(B).

39. *Sparacello v Andrews* (La App 1st Cir) 501 So 2d 269, cert den (La) 502 So 2d 103; *Finkel v Finkel*, 120 Misc 2d 936, 466 NYS2d 906.

Where negligence actions involve separate, unrelated accidents, separate trials will enable the juries to focus on the factual issues presented as to each accident. *Shackleford v Mills* (2d Dept) 110 App Div 2d 630, 487 NYS2d 371. To the same effect, see *Burleson v Callanan Industries, Inc.* (3d Dept) 151 App Div 2d 949, 543 NYS2d 225, holding that severance of the claim against the first defendant was proper where plaintiff was injured in two car accidents and sued all defendants in one complaint; although plaintiff alleged that he suffered a back injury in the first accident which was exacerbated by the second accident, the court rejected plaintiff's claim of prejudice because of possible inconsistent verdicts in separate trials.

40. § 123.

41. § 124.

denying separate trials.⁴³ However, the standards of convenience, avoidance of prejudice, and conduciveness to expedition and economy, are all in the alternative, and need not all be present for separation or severance, the presence of any one of them being sufficient to sustain an order for separate trial.⁴⁴

In addition to those factors specifically enumerated above, courts have mentioned the following factors as supporting their need for separate trials:

Confusion to the jury⁴⁵

The possibility of inconsistent jury verdicts⁴⁶

Reducing the discovery time period⁴⁷

■■■■ Observation: While all of these factors are properly taken into consideration in the decision to separate, none is the ultimate objective; the paramount consideration at all times is the fair and impartial trial to all litigants, and considerations of economy of time, money, and convenience of witnesses must yield thereto.⁴⁸

Some cases would more clearly benefit from bifurcating certain issues than other cases. A bifurcated trial is particularly appropriate where separate submission of issues avoids confusion and promotes a logical presentation to the jury, and where resolution of the separated issue will potentially dispose of the entire case, eliminating the need for a second proceeding.⁴⁹

42. § 125.

43. *Larsen v Powell* (DC Colo) 16 FRD 322.

Bifurcation for trial of county's case against contractor responsible for construction of pollution control facility is proper under Rule 42(b), where court determined that claim with respect to heat treatment equipment (1) constituted separate claim in that it presented aggregate of facts giving rise to enforceable rights, (2) comprised largest and most important issue in case, from which lengthy trial of numerous unrelated claims would divert focus, and (3) was based on separate facts which would not require relitigation for other claims, and where bifurcation would result in savings of time and expenses to parties and to court, and would not prejudice party not seeking bifurcation. *Aiken County v BSP Div. of Envirotech Corp.* (DC SC) 657 F Supp 1339, *aff'd in part and rev'd in part* (CA4 SC) 866 F2d 661.

44. *Re Paris Air Crash* (CD Cal) 69 FRD 310; *United States v International Business Machines Corp.* (SD NY) 60 FRD 654, 1973-2 CCH Trade Cases ¶ 74613, 17 FR Serv 2d 1245.

45. *Kurkierewicz v Loewen* (DC Mont) 109 FRD 601; *Beights v W.R. Grace & Co.* (WD Okla) 67 FRD 81.

46. *Hicks v Unger Motor Co.* (ED Pa) 332 F Supp 118; *Henry v Goliger* (DC NY) 94 F Supp 385; *State Mut. Life Assur. Co. v Arthur Andersen & Co.* (DC NY) 63 FRD 389, CCH Fed Secur L Rep ¶ 94706, later proceeding (SD NY) CCH Fed Secur L Rep ¶ 94954; *Reliable*

Volkswagen Sales & Service Co. v World-Wide Auto. Corp. (DC NJ) 34 FRD 134, 7 FR Serv 2d 1062; *Commercial Banking Corp. v Indemnity Ins. Co.* (DC Pa) 1 FRD 380.

Severance should be refused if it will create potential problems because the amount of fault attributable to all the parties has to be determined and separate trials could lead to inconsistent verdicts on this issue. *Hackman v Dandamudi* (Mo App) 733 SW2d 452. To the same effect, see *Slusher v Ospital* (Utah) 777 P2d 437, 111 Utah Adv Rep 18.

47. *Sogmose Realities, Inc. v Twentieth Century-Fox Film Corp.* (DC NY) 15 FRD 496.

48. *Components, Inc. v Western Electric Co.* (DC Me) 318 F Supp 959, 167 USPQ 583, 1970 CCH Trade Cases ¶ 73370, 14 FR Serv 2d 774; *Martin v Bell Helicopter Co.* (DC Colo) 85 FRD 654, 32 FR Serv 2d 354; *Molinaro v Watkins—Johnson CEI Div.* (DC Md) 60 FRD 410, 180 USPQ 237, 17 FR Serv 2d 1249; *Lo Cicero v Humble Oil & Refining Co.* (ED La) 52 FRD 28, 1971 CCH Trade Cases ¶ 73486, 14 FR Serv 2d 1305, 12 ALR Fed 826.

49. *Finkel v Finkel*, 120 Misc 2d 936, 466 NYS2d 906; *Re Will of Hester*, 320 NC 738, 360 SE2d 801, reh den 321 NC 300, 362 SE2d 780.

The court's discretion should generally be in favor of first trying those issues which will most probably end the case. *Mitchell v Federal Intermediate Credit Bank*, 165 SC 457, 164 SE 136, 83 ALR 629.

Observation: Some courts take the view that a severance is proper only if the suit involves two or more separate and distinct causes of action, and that each of the causes into which the action is severed must be such that it might properly be tried and determined as if it were the only claim in controversy.⁵⁰ In this connection, it has been held that a joint tort gives rise to only a single cause of action, which cannot be bifurcated.⁵¹

Where a joint trial against an insured for negligence and the insurer for breach of contract would violate an evidence code provision making evidence of liability insurance inadmissible to prove negligence or wrongdoing, the problem is easily remedied by bifurcating the cause of action against the insurer from the cause of action against the insured.⁵²

Anticipation of an agreed settlement is not a proper basis upon which to rest an order of bifurcation.⁵³

§ 123. —Avoidance of prejudice

It has been held that the avoidance of prejudice would be furthered by the ordering of a separate trial under FRCP 42(b) where:

—in a personal injury action arising from an accident involving a truck and an automobile, the ordering of a separate trial on the issue of liability would avoid prejudice by precluding consideration by the jury of the evidence of the injuries, such evidence being relevant only on the question of damages.⁵⁴

—the evidence of damages and the severity of the plaintiff's injury might have been prejudicial to the defendant, and proof would have taken several days.⁵⁵

—the defendant in an antitrust case counterclaimed that the plaintiff had violated the antitrust laws, and the counterclaim alleged antitrust violations identical to those charged by the plaintiff, and the defendant sought only equitable relief, so that his claim would be triable by the court alone.⁵⁶

On the other hand, defendants' motion to bifurcate the issues of liability and damages is properly denied where bifurcation would not alleviate the prejudice one defendant fears it will suffer from being a large corporation, and where, with corporations and individuals on both sides of the dispute, the danger of prejudice against corporations is not particularly acute.⁵⁷

§ 124. —Convenience

Courts have concluded that the ordering of a separate trial would further convenience where:

—by ordering separate trial of a third-party complaint the court could avoid

50. *Perma Stone-Surfa Shield Co. v Merideth* (Tex App San Antonio) 752 SW2d 224.

51. *Knight v McBee* (Okla) 767 P2d 878.

52. *Ahmed v Peterson* (4th Dist) 186 Cal App 3d 374, 230 Cal Rptr 636.

53. *Gaede v District Court of Eighth Judicial Dist.* (Colo) 676 P2d 1186.

54. *Crummett v Corbin* (CA6 Ohio) 475 F2d 816, 70 Ohio Ops 2d 36, 17 FR Serv 2d 535.

55. *Beeck v Aquaslide 'N' Dive Corp.* (CA8 Iowa) 562 F2d 537, 24 FR Serv 2d 1, later proceeding (Iowa) 302 NW2d 90, later app (Iowa) 350 NW2d 149.

56. *Pearl Brewing Co. v Jos. Schlitz Brewing Co.* (SD Tex) 415 F Supp 1122, 1976-2 CCH Trade Cases ¶ 61169, 21 FR Serv 2d 979.

57. *Intersong-USA, Inc. v CBS, Inc.* (SD NY) 1 FR Serv 3d 609.

trial on the third-party complaint if the third-party plaintiff were successful in defending a cross claim filed against it.⁵⁸

—separation of the damage issue would allow a clear understanding by the jury of the issues, make the closing arguments less embracive, and shorten the jury charge at the end of each stage of the proceeding.⁵⁹

§ 125. —Expedition and economy

Generally, it is said that economy and the expedition of the case will be promoted by the ordering of a separate trial where the determination of one issue will be dispositive of the entire case,⁶⁰ or where the trial of other issues will be avoided by the determination of one issue.⁶¹ Indeed, this is the reason most often advanced for the separation of liability and damages issues.⁶² Thus, whether multiple claims should be tried in one suit or several should be determined by considerations of judicial economy of the parties rather than by the potential effect on substantive rights.⁶³

It has been held that expedition and economy would be promoted by the granting of a separate trial under FRCP 42(b) where:

—the issue of the statute of limitations could be determined upon less evidence than would be involved in the trial of the whole case, and that issue would be determinative of whether there was a necessity to try the entire matter.⁶⁴

—the trial court ordered separate trials on the issues of liability and damages after the trial had begun, when it became apparent, because the plaintiff's medical expert could not testify when needed, that there would be a 5-day delay between the presentation of evidence as to liability and the jury's consideration of the case.⁶⁵

—the order for separate trial would bar or cut down the scope of the plaintiffs' action in an antitrust suit, so that arduous and expensive preparations for trying the main suit might be avoided, and if the main suit still had to be tried none of the parties would be prejudiced.⁶⁶

■■■■ Observation: Considerations of clarity and avoidance of confusion may favor separate trials of claims and outweigh the economies which might be achieved by a single trial.⁶⁷

§ 126. Denying separate trial

Generally, it is said that a separate trial will not be ordered where to do so

58. *Beights v W.R. Grace & Co.* (WD Okla) 67 FRD 81.

59. *Lo Cicero v Humble Oil & Refining Co.* (ED La) 52 FRD 28, 1971 CCH Trade Cases ¶ 73486, 14 FR Serv 2d 1305, 12 ALR Fed 826.

60. *Hanover Shoe, Inc. v United Shoe Machinery Corp.* (MD Pa) 185 F Supp 826, affd (CA3 Pa) 281 F2d 481, cert den 364 US 901, 5 L Ed 2d 194, 81 S Ct 234, reh den 364 US 939, 5 L Ed 2d 371, 81 S Ct 377; *Momand v Paramount Pictures Distributing Co.* (DC Mass) 36 F Supp 568.

61. *Hahn v Woodlyn Fire Co.* (ED Pa) 32 FRD

429, 7 FR Serv 2d 870; *Larsen v Powell* (DC Colo) 16 FRD 322.

62. § 143.

63. *Haney Electric Co. v Hurst* (Tex Civ App Dallas) 624 SW2d 602, writ granted (Tex) 25 Tex Sup Ct Jour 308.

64. *Momand v Paramount Pictures Distributing Co.* (DC Mass) 36 F Supp 568.

65. *Kisteneff v Tiernan* (CA1 RI) 514 F2d 896, 20 FR Serv 2d 492.

66. *Taxin v Food Fair Stores, Inc.* (ED Pa) 24 FRD 457, 2 FR Serv 2d 722.

67. *Manufacturers Bank & Trust Co. v Transamerica Ins. Co.* (ED Mo) 568 F Supp 790.

would inconvenience the court or prejudice the rights of parties,⁶⁸ or where instead of furthering convenience or promoting expedition or economy, the separate trial would more likely provoke great inconvenience and require expenditure of additional time,⁶⁹ or where a separate trial would not avoid prejudice.⁷⁰

Where multiple issues are so interwoven that they cannot be dealt with in separate trials, a motion for separate trial will be denied.⁷¹ Frequently courts will deny a motion for a separate trial under FRCP 42(b) where the issues are identical or closely related.⁷² Above all, the issues at trial must not be bifurcated unless the issue to be tried is so distinct and separable from the others that a trial of it alone may be had without injustice.⁷³

C. PRACTICE AND PROCEDURE [§§ 127-130]

§ 127. Generally

Some courts recognize that the trial court may order a separate trial or severance sua sponte (on its own motion),⁷⁴ as where it makes a factual determination that there is a misjoinder of causes of action.⁷⁵ However, other courts hold that the trial court is not required to bifurcate the trial sua sponte,⁷⁶ and that a party is not denied procedural due process because of the trial court's failure to bifurcate the trial on its own motion.⁷⁷

68. *Conmar Products Corp. v Lamar Slide Fastener Corp.* (DC NY) 50 F Supp 1019, 58 USPQ 58.

69. *Patrick v Sharon Steel Corp.* (ND W Va) 549 F Supp 1259, 11 Fed Rules Evid Serv 1764; *Greear v John Long Trucking, Inc.* (WD Okla) 272 F Supp 224, 11 FR Serv 2d 1107; *Frasier v Twentieth Century-Fox Film Corp.* (DC Neb) 119 F Supp 495; *Banana Distributors, Inc. v United Fruit Co.* (DC NY) 19 FRD 11; *Grissom v Union P.R. Co.* (DC Colo) 14 FRD 263.

If the effect of bifurcation would be to exacerbate or prolong the litigation, then it should not be utilized even though the nature of the action lends itself to such a procedure. *Finkel v Finkel*, 120 Misc 2d 936, 466 NYS2d 906.

70. *United States v Marietta Mfg. Co.* (DC W Va) 53 FRD 390.

District Court did not err in not bifurcating disability insurance coverage case into liability and damages phrases so as to exclude disabled plaintiff from court during trial of liability issues, where District Court demonstrated awareness of potentially prejudicial effect of insured's presence in courtroom by permitting him to remain there only for 5 minutes requested by his counsel and directing counsel to bring plaintiff in before jury entered and take him away after jury left to avoid attracting undue attention to his condition. *Gonzalez-Marin v Equitable Life Assur. Soc.* (CA1 Puerto Rico) 845 F2d 1140, 11 FR Serv 3d 308.

71. *C.W. Regan, Inc. v Parsons, Brinckerhoff,*

Quade & Douglas (CA4 Va) 411 F2d 1379; *United Air Lines, Inc. v Wiener* (CA9 Cal) 286 F2d 302, 4 FR Serv 2d 766, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1352, later proceeding (CA9 Cal) 335 F2d 379, 8 FR Serv 2d 49b.42, Case 1, cert dismd 379 US 951, 13 L Ed 2d 549, 85 S Ct 452; *Drake v Handman* (SD NY) 30 FRD 394, 6 FR Serv 2d 1047.

72. *Hicks v Unger Motor Co.* (ED Pa) 332 F Supp 118.

73. *Ennix v Clay* (Tenn) 703 SW2d 137.

Severance is proper only if the suit involves two or more separate and distinct causes of action. Each of the causes into which the action is severed must be such that each might properly be tried and determined as if it were the only claim in controversy. *Perma Stone-Surfa Shield Co. v Merideth* (Tex App San Antonio) 752 SW2d 234.

74. *Swenson v Sawoska*, 18 Conn App 597, 559 A2d 1153, app gr, in part 212 Conn 810, 564 A2d 1073 and affd 215 Conn 148, 575 A2d 206; *Life Investors Ins. Co. v Citizens Nat. Bank*, 223 Neb 663, 392 NW2d 771; *Council of Plymouth Township v Montgomery County*, 109 Pa Cmwlth 616, 531 A2d 1158; *Bennett v Warner* (W Va) 372 SE2d 920.

75. *Alanco v Bystrom* (Fla App D3) 544 So 2d 217, 14 FLW 729, review den (Fla) 553 So 2d 1164.

76. *Crumpton v Kelly*, 185 Ga App 245, 363 SE2d 799; *Rands v Forest Lake Lumber Mart, Inc.* (Minn App) 402 NW2d 565.

77. *Central Alabama Electric Cooperative v*

■■■■ *Recommendation:* The better and safer practice is for the party claiming entitlement to a separate hearing on a particular issue to make a request to the trial court.⁷⁸

In either case, parties moving for separate trials of issues, or the court if acting sua sponte, must provide sufficient justification to establish for review that informed discretion could have determined that bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice.⁷⁹

■■■■ *Practice guide:* In order to effectuate a “true” severance, the judge should explicitly direct the clerk to docket a new civil action and should explain how the new case should be styled. Otherwise, a reviewing court may hold that a “true” severance did not occur, that is, that only a separate trial had been ordered, even though the word “severance” was used in the judge’s order.⁸⁰ Where a “true” severance is ordered and the clerk docket a separate case with a new civil action number, an additional filing fee is required and should be prepaid by the party proceeding as plaintiff in the severed action.⁸¹ The better practice is to retain the same jury for all issues, even though it may hear the issues at different times.⁸²

§ 128. Plaintiff as moving party

Although the request for separate trial is generally made by the defendant, where no statute or rule deals with the matter,⁸³ the courts have generally held or recognized that plaintiffs may be entitled to a severance or separate trial,⁸⁴ as where they are divorced,⁸⁵ or where plaintiff’s action has been joined with a private class action, which would cause a delay in deciding its case.⁸⁶ However,

Tapley (Ala) 546 So 2d 371.

78. *Crumpton v Kelly*, 185 Ga App 245, 363 SE2d 799.

It is incumbent upon counsel to make a motion for bifurcated trial of the issues. *Rands v Forest Lake Lumber Mart, Inc.* (Minn App) 402 NW2d 565.

Practice References: Bifurcated hearing in juvenile court proceeding. 14 Am Jur Trials 619, Juvenile Court Proceedings § 57.

Forms: Motion, affidavits, and orders for severance. 1 Am Jur Pl & Pr Forms (Rev), Actions, Forms 41 et seq.

11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Forms 111 et seq.

11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 1551 et seq.

23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 43 et seq.; 1 Federal Procedural Forms, L Ed §§ 1:1480-1:1483.

79. *Bennett v Warner* (W Va) 372 SE2d 920.

80. Opinion of Clerk, Supreme Court (Ala) 526 So 2d 584.

See also *Archambault v Archambault* (Tex App Beaumont) 763 SW2d 50, where the appellate court noted that the trial court ordered that certain issues be litigated separately, but its order did not sever the action nor docket it under a different cause number.

81. Opinion of Clerk, Supreme Court (Ala) 526 So 2d 584.

82. *Re Will of Hester*, 320 NC 738, 360 SE2d 801, reh den 321 NC 300, 362 SE2d 780.

83. As to FRCP 42(b) and similar state rules of procedure, see §§ 117 et seq.

84. *Chevassus v Harley* (DC Pa) 8 FRD 410; *Edester v Heady* (Ky) 364 SW2d 811; *Rhodes v Harwood*, 280 Or 399, 571 P2d 492.

Annotations: Right of plaintiff suing jointly with others to separate trial or order of severance, 99 ALR2d 670 § 2.

85. *Rhodes v Harwood*, 280 Or 399, 571 P2d 492.

86. *League of Martin v Milwaukee* (ED Wis) 588 F Supp 1004, 42 BNA FEP Cas 562, 35 CCH EPD ¶ 34894.

in some cases it has been held that a severance of one plaintiff's action from that of the other plaintiffs was unnecessary.⁸⁷

Where the right to a severance or separate trial is dealt with generally by a controlling statute or court rule, the question of the right of a joint plaintiff to separation or severance is one of the proper interpretation of the language of the statute or rule; and the matter may further be affected by more general procedural enactments.⁸⁸ Thus, under a Code provision that all persons may be joined in one action as plaintiffs where, if they should bring separate actions, any question of law or fact common to all the parties to the action would arise, and that if it appears that such joinder may embarrass or delay the trial of the action, the court may, on application of any party, order separate trials or make such order as is expedient, the granting of separate trials to plaintiffs who have joined in the same action has been held to be discretionary with the trial court.⁸⁹

■■■■ Observation: FRCP 42(b) does not prevent a plaintiff from applying for a separate trial.⁹⁰

A plaintiff United States' action could be severed from a private class action where it did not agree with a proposed consent order, no party objected to the severance, and it would be unwise to delay the decision on the class' and defendants' motions for approval of the proposed consent order.⁹¹

§ 129. Checklist for motion

A motion for a separate trial of properly joined causes of action should reflect the attention of the pleader to the following considerations:

- Will trial of one cause of action, if first tried separately and determined in favor of particular party, avoid expense incident to trial of other cause of action?
- Are interests of defendants hostile?
- Is action against defendants based on different legal liabilities?
- Would joint trial involve submission of complex and abstruse questions to jury and materially affect substantial rights of parties?
- Will some evidence be admissible as against one and inadmissible against another party?
- Will separate instructions be necessary for individual defendants or individual plaintiffs?

87. *Khoury v Tifo Cab Corp.* (2d Dept) 21 App Div 2d 894, 251 NYS2d 719.

88. *Arnold v United States*, 263 US 427, 68 L Ed 371, 44 S Ct 144; *Miller v American Bonding Co.*, 257 US 304, 66 L Ed 250, 42 S Ct 98.

Annotations: 99 ALR2d 670 § 3.

89. *Pfefferle v Lastreto* (1st Dist) 206 Cal App 2d 575, 23 Cal Rptr 834, 99 ALR2d 663.

Annotations: 99 ALR2d 670 § 3.

90. *Eastside Church of Christ v National Plan, Inc.* (CA5 Tex) 391 F2d 357, CCH Fed Secur L Rep ¶ 92166, 12 FR Serv 2d 1021, cert den 393 US 913, 21 L Ed 2d 198, 89 S Ct 240 and (disapproved on other grounds by *Mills v Elec-*

tric Auto-Lite Co., 396 US 375, 24 L Ed 2d 593, 90 S Ct 616, CCH Fed Secur L Rep ¶ 92556, later app (CA7 Ill) 552 F2d 1239, CCH Fed Secur L Rep ¶ 96035, cert den 434 US 922, 54 L Ed 2d 279, 98 S Ct 398, reh den 434 US 1002, 54 L Ed 2d 499, 98 S Ct 649; *Henan Oil Tools, Inc. v Engineering Enterprises, Inc.* (SD Tex) 262 F Supp 629, 151 USPQ 698, 1967 CCH Trade Cases ¶ 72046, 10 FR Serv 2d 1137; *Seaboard Terminals Corp. v Standard Oil Co.* (DC NY) 30 F Supp 671; *Chevassus v Harley* (DC Pa) 8 FRD 410.

91. *League of Martin v Milwaukee* (ED Wis) 588 F Supp 1004, 42 BNA FEP Cas 562, 35 CCH EPD ¶ 34894.

An affidavit by a defendant or defendant's attorney in support of a motion for a separate trial from codefendants should, among other things, aver:

- Status of affiant
- Nature and status of action
- Grounds for motion
 - State facts showing that:
 - (1) legal prejudice will result from single trial of all defendants;
 - (2) no prejudice will result to any party by severance; or
 - (3) joint trial will deprive defendant of some substantial right that will be available to defendant if defendant's cause is tried separately.

§ 130. Setting aside prior order

The trial court retains the power until the entry of a final judgment to set aside, for appropriate reasons, a former order for a separate trial of counterclaims.⁹² Although the trial court has the power to revoke its earlier decision that trial would be split, where the trial court has clearly and repeatedly deferred trial of one issue, it can effectively change its decision only by an equally clear statement coupled with a fair opportunity to offer additional proof with respect to the deferred issue.⁹³

d. PARTICULAR TYPES OF ACTIONS [§§ 131–136]

§ 131. Contract actions

Separate trial under FRCP 42(b) has been approved in contract actions where:

- the court ordered a separate trial on the issue of the meaning of a particular term in the contract, which was the most critical question in the litigation.⁹⁴
- a suit was brought for the rescission of a contract for the sale of stock, and a counterclaim was made against the president of the plaintiff corporation for libel and slander as a result of the transaction which brought about the rescission suit, even though it appeared that facts would be established in the trial of the counterclaim which could be a defense to the original action.⁹⁵

On the other hand, it has been held that a separate trial would not be ordered under FRCP 42(b) in contract cases where:

- an antitrust issue arose in an action based upon a contract, and it did not appear that the antitrust issue was susceptible of speedy and easy resolution divorced from the facts of the nature and character of the parties, their business, and the relationship between them.⁹⁶
- an action was brought charging the defendants with numerous breaches of their fiduciary duties with respect to union funds, and the issue of

92. *Partmar Corp. v Paramount Pictures Theatres Corp.*, 347 US 89, 98 L Ed 532, 74 S Ct 414, reh den 347 US 931, 98 L Ed 1083, 74 S Ct 527.

93. *Knapp v McFarland* (CA2 NY) 457 F2d 881, cert den 409 US 850, 34 L Ed 2d 92, 93 S Ct 59.

94. *North Cent. Airlines, Inc. v Continental*

Oil Co., 187 App DC 371, 574 F2d 582, 23 UCCRS 581.

95. *Value Line Fund, Inc. v Marcus* (SD NY) 161 F Supp 533, 1 FR Serv 2d 121.

96. *George Hantscho Co. v Miehle—Goss—Dexter, Inc.* (SD NY) 33 FRD 332, 7 FR Serv 2d 874.

whether the execution of the defendant's employment contract and the making and receipt of payments thereunder constituted a breach of the fiduciary duty arose, and the court concluded that a separate trial on that issue would not eliminate any of the parties and might result in duplication of evidence and additional expense and inconvenience to witnesses whose testimony would be required in connection with both matters.⁹⁷

■■■■ *Practice guide:* In an action for the breach of a contract, where the issues of the contract's existence and validity are to be tried separately, the scope of the depositions should be limited to the separated issues.⁹⁸

The propriety of ordering separate trials as to liability and damages, under FRCP 42(b), in contract actions, is discussed in a later part of this subdivision.⁹⁹

§ 132. Tort actions, generally

In tort actions separate trial under FRCP 42(b) has been found appropriate where:

- a wife and her husband were involved in an automobile accident with the defendant while the husband was driving the family car, and where the defendant would be deprived of contribution from the husband unless he was able to join the husband as a third-party defendant in the wife's action, and this could not be done while the husband remained a coplaintiff.¹
- a motion for separate trial on the issue of incapacity was requested in an action for personal injuries against a municipality, and where the defendant alleged as a defense the failure of the plaintiff to file a notice of claim within the time prescribed, and the issue was raised that the statute of limitations would be tolled during the incapacity of the plaintiff and for a reasonable time thereafter.²
- indemnification was sought by a party against a third-party defendant for damages, and possible prejudice to the third-party defendant outweighed the plaintiff's double court expenses of two trials.³
- it was agreed at a pretrial conference that the defendant would not be chargeable with negligence unless a state statute prescribing rules of the road applied, and the court ordered a separate trial on the issue as to whether the place where the accident occurred was a public highway within the meaning of the state statute.⁴

Claims made by the administrator of an estate based on alleged misapplication of decedent's funds and securities against a clearing agent for allowing alleged unauthorized use of securities and cash by a brokerage firm would be tried separately from claims against the brokerage firm, which allegedly converted the securities and cash, where there was no claim of collusion or conspiracy or identity of interests between the brokerage firm and the clearing

97. *Morrissey v Curran* (SD NY) 20 FR Serv 2d 262.

98. *Canister Co. v National Can Corp.* (DC Del) 3 FRD 279.

99. § 142.

1. *Chevassus v Harley* (DC Pa) 8 FRD 410.

2. *Karolkiewicz v Schenectady* (DC NY) 28 F Supp 343.

3. *Dewald v Minster Press Co.* (CA6 Mich) 494 F2d 795, 18 FR Serv 2d 699.

4. *King v Edward Hines Lumber Co.* (DC Or) 68 F Supp 1019.

agent, and a joint trial would present an overwhelming danger of unfair prejudice to the clearing agent, confusion of issues, and substantial trial disruption.⁵

On the other hand, it has been found in tort actions that separation was not proper under FRCP 42(b) where:

- an action was brought against the government and an air carrier for damages resulting from a midair collision, and the issues of liability and damages were not so distinct so that they could be presented to the jury independently without confusion and uncertainty amounting to the denial of a fair trial.⁶
- an action was brought by an administratrix against multiple defendants and the denial of a motion for separation would expedite the case and deter costs, even where the party requesting separation would likely be liable under a state wrongful death statute while the other defendants would likely be liable under the Federal Employers' Liability Act.⁷

The propriety of ordering separate trials as to liability and damages, under FRCP 42(b), in tort actions, is discussed in a later part of this subdivision,⁸ as is the separate trial of the issues of tort liability and the validity and effect of a release.⁹

§ 133. Matrimonial actions

At first blush, a matrimonial action would appear to be most susceptible to bifurcation. In most such actions, a point is reached where there is no real dispute over ending the marriage itself. Most divorce actions could be settled if it were not for the task of resolving the ancillary issues such as custody, visitation, support, and equitable distribution. However, the court cannot ignore the practical effects of bifurcation in a typical matrimonial action. Thus, the granting of a divorce is frequently utilized as a means of leverage to enforce a resolution of economic issues. More often than not, one of the parties is anxious to end the marriage while the other is more reluctant to terminate the relationship, and the delicate balance between this eagerness and reluctance is often tipped by economic considerations. While it is apparent that the grounds for divorce can often be separated from the economic disputes, they are very much interrelated; and the prospect of terminating a marriage contract without first resolving the parties' future economic security would unnecessarily add to the court's already overburdened caseload.¹⁰

Accordingly, while bifurcation is an attractive procedural device in many tort proceedings,¹¹ such is not the case in matrimonial disputes. Resolving the divorce cause of action initially cannot eliminate the need for a further trial on the economic issues. In fact, it is likely that both bifurcated proceedings could become bitterly protracted. On the other hand, nonbifurcation in matrimonial actions will result in one proceeding which has a better chance of resolution

5. *Ropfogel v Wise* (SD NY) 112 FRD 414.

Supp 813, 10 FR Serv 2d 1134.

6. *United Air Lines, Inc. v Wiener* (CA9 Cal) 286 F2d 302, 4 FR Serv 2d 766, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1352, later proceeding (CA9 Cal) 335 F2d 379, 8 FR Serv 2d 49b.42, Case 1, cert dismd 379 US 951, 13 L Ed 2d 549, 85 S Ct 452.

8. § 141.

9. § 142.

10. *Finkel v Finkel*, 120 Misc 2d 936, 466 NYS2d 906.

7. *Durham v Southern R. Co.* (WD Va) 254 F

11. § 132.

because of the interaction of all disputed factors upon each other.¹² However, severance of a divorce hearing from the issue of equitable distribution of the marital assets has been upheld as against the contention that such a severance affected a substantial right of the wife.¹³ And it has been held that if a claim for attorney's fees can be prosecuted in a separate suit brought by an attorney, such claim is a separate cause of action and may properly be severed from a divorce action.¹⁴

§ 134. Antitrust suits under FRCP 42(b)

Although FRCP 42(b)¹⁵ provides that a Federal District Court may order a separate trial of any claim, cross claim, counterclaim, or third-party claim, or of any separate issue or of any number of such claims or issues, in federal antitrust suits involving prayers for both legal and equitable relief, separate trials, under the federal rule, of legal and equitable issues have been held improper,¹⁶ as has a separate trial on the issue of the court's subject matter jurisdiction.¹⁷ However, in some federal antitrust suits the courts have held or indicated that separate trials of the liability and damages issue would be proper under the rule,¹⁸ and although there are cases that have reached the

12. *Finkel v Finkel*, 120 Misc 2d 936, 466 NYS2d 906.

13. *Sharp v Sharp*, 84 NC App 128, 351 SE2d 799, wherein the court, rejecting the wife's argument that severance would permit the plaintiff to dispose of his interests in contested property thereby defeating the court's power to distribute those assets, pointed out that a statute effectively provided for "freezing" the marital estate as of the date of the parties' separation and any subsequent conversion of marital property for individual purposes may be charged against the acting spouse's share.

14. *Petrovich v Vautrain* (Tex App Fort Worth) 730 SW2d 857, writ ref n re (Dec 16, 1987) and reh'g of writ of error overr (Feb 10, 1988).

15. § 117.

16. *Beacon Theatres, Inc. v Westover*, 359 US 500, 3 L Ed 2d 988, 79 S Ct 948, 2 FR Serv 2d 650.

Annotations: Separate trials, under Rule 42(b) of Federal Rules of Civil Procedure, of claims or issues in suits involving federal antitrust laws, 12 ALR Fed 831 § 4.

17. *Marks Food Corp. v Barbara Ann Baking Co.* (CA9 Cal) 274 F2d 934, 2 FR Serv 2d 663, 3 FR Serv 2d 679.

Annotations: 12 ALR Fed 831 § 5.

18. *Greenhaw v Lubbock County Beverage Asso.* (CA5 Tex) 721 F2d 1019, 1984-1 CCH Trade Cases ¶65777, 38 FR Serv 2d 115, reh den (CA5 Tex) 726 F2d 752 and (ovrld on other grounds by *International Woodworkers of America, etc. v Champion International Corp.* (CA5 Miss) 790 F2d 1174, 43 BNA FEP

Cas 385, 40 CCH EPD ¶36148, 4 FR Serv 3d 721, cert gr 479 US 983, 93 L Ed 2d 573, 107 S Ct 568, motion gr 479 US 1027, 93 L Ed 2d 824, 107 S Ct 869 and motion gr 479 US 1080, 94 L Ed 2d 137, 107 S Ct 1273, 107 S Ct 1277 and affd, remanded 482 US 437, 96 L Ed 2d 385, 107 S Ct 2494, 43 BNA FEP Cas 1775, 43 CCH EPD ¶37102, 1987-1 CCH Trade Cases ¶67596, 7 FR Serv 3d 1161, on remand, en banc (CA5 La) 826 F2d 309, 1987-2 CCH Trade Cases ¶67849; *Re Ampicillin Antitrust Litigation* (DC Dist Col) 88 FRD 174, 1981-1 CCH Trade Cases ¶64059; *Lo Cicero v Humble Oil & Refining Co.* (ED La) 52 FRD 28, 1971 CCH Trade Cases ¶73486, 14 FR Serv 2d 1305, 12 ALR Fed 826. For contrary authority, see *Re Industrial Gas Antitrust Litigation* (ND Ill) 100 FRD 280, 1983-2 CCH Trade Cases ¶65535, 1983-2 CCH Trade Cases ¶65700, 37 FR Serv 2d 1178; *Broadway Delivery Corp. v United Parcel Service, Inc.* (SD NY) 74 FRD 438, 1977-2 CCH Trade Cases ¶61688, 25 FR Serv 2d 792.

Conducting separate trials, pursuant to Rule 42(b), of liability and damage stages of consolidated antitrust cases is appropriate tool for dealing with complex litigation and is warranted where proof that will be introduced as to liability issues is in large part common to all plaintiffs, while proof as to damages is likely to be much more individualized and resolvable only through long series of separate minitrials or by reference to special master. *Re Master Key Antitrust Litigation* (DC Conn) 70 FRD 23, 1975-1 CCH Trade Cases ¶60377, 20 FR Serv 2d 619, app dismd (CA2 Conn) 528 F2d 5, 1975-2 CCH Trade Cases ¶60648, 21 FR Serv 2d 276.

Annotations: 12 ALR Fed 831 § 6.

opposite result,¹⁹ in several federal antitrust cases the courts have held or indicated that some liability issues could be tried separately pursuant to Rule 42(b).²⁰

In a number of cases the issue whether the antitrust claim was barred by the statute of limitations has been ordered tried separately pursuant to the rule.²¹ And in several federal antitrust cases the courts have granted motions under Rule 42(b) for a separate trial of the issue of whether the antitrust claimant had granted a release of his antitrust claim.²² In some federal antitrust suits brought against multiple defendants, the courts have denied motions under Rule 42(b) by some of the defendants for separate trials of the cases against them.²³ Where the defendants file a nonantitrust counterclaim, the court will deny a motion under Rule 42(b) for a separate trial of the counterclaim.²⁴

§ 135. —Antitrust issues in nonantitrust suits

In another class of cases, an antitrust claim is joined with a nonantitrust claim, or an antitrust defense, counterclaim, or cross claim is raised in answer to a nonantitrust claim. The most common example is the patent infringement suit in which an antitrust violation is asserted as a defense or counterclaim. Frequently, but not invariably, in such cases, the courts have granted motions under Rule 42(b) for separate trials of the patent and antitrust issues.²⁵ Similarly, the courts have ordered separate trials of the patent and antitrust issues in suits for judgments declaring a patent invalid or not infringed by the plaintiff, in which an antitrust violation is asserted as a claim or counterclaim.²⁶ The courts have also ordered separate trials of antitrust claims, counterclaims, or cross claims filed in suits for trademark or copyright infringement or unfair

19. *Ingram Corp. v J. Ray McDermott & Co.* (ED La) 495 F Supp 1321, 1980-81 CCH Trade Cases ¶ 63697, revd, in part on other grounds (CA5 La) 698 F2d 1295, 1983-1 CCH Trade Cases ¶ 65241, 76 ALR Fed 1; *Utah Gas Pipelines Corp. v El Paso Natural Gas Co.* (DC Utah) 233 F Supp 955; *Tri-R Systems, Ltd. v Friedman & Son, Inc.* (DC Colo) 94 FRD 726, 1982-2 CCH Trade Cases ¶ 64884, 11 Fed Rules Evid Serv 850, 34 FR Serv 2d 1457; *Reliable Volkswagen Sales & Service Co. v World-Wide Auto. Corp.* (DC NJ) 34 FRD 134, 7 FR Serv 2d 1062.

Annotations: 12 ALR Fed 831 § 7[b].

20. *Reines Distributors, Inc. v Admiral Corp.* (SD NY) 257 F Supp 619, 1966 CCH Trade Cases ¶ 71640; *Hospital Bldg. Co. v Trustees of Rex Hospital* (ED NC) 86 FRD 694; *United States v American Tel. & Tel. Co.* (DC Dist Col) 83 FRD 323.

Annotations: 12 ALR Fed 831 § 7[a].

21. *Braun v Berenson* (CA5 Tex) 432 F2d 538, 1970 CCH Trade Cases ¶ 73338.

Annotations: 12 ALR Fed 831 § 8.

22. *Winchester Drive-In Theatre, Inc. v Twentieth Century-Fox Film Co.* (ND Cal) 35 FRD 141, 8 FR Serv 2d 42b.12, Case 1.

Annotations: 12 ALR Fed 831 § 9.

23. *Walder v Paramount Publix Corp.* (DC NY) 1956 CCH TC ¶ 68572.

Annotations: 12 ALR Fed 831 § 10.

24. *Magna Pictures Corp. v Paramount Pictures Corp.* (CD Cal) 265 F Supp 144, 153 USPQ 591, 1967 CCH Trade Cases ¶ 72113, 11 FR Serv 2d 132; *Southern Anchor Bolt Co. v Atlantic Steel Co.* (SD Ga) 96 FRD 15, 1982-83 CCH Trade Cases ¶ 65102, 35 FR Serv 2d 910.

Annotations: 12 ALR Fed 831 § 11.

25. *Re Innotron Diagnostics* (CA FC) 800 F2d 1077, 231 USPQ 178, 1986-2 CCH Trade Cases ¶ 67273, 5 FR Serv 3d 1156; *Carlisle Corp. v Hayes* (SD Cal) 635 F Supp 962, later proceeding (SD Cal) 229 USPQ 218; *Brandt, Inc. v Crane* (ND Ill) 97 FRD 707, 221 USPQ 1118, 1983-2 CCH Trade Cases ¶ 65573, 36 FR Serv 2d 714.

Annotations: Separate trials, under Rule 42(b) of Federal Rules of Civil Procedure, of claims or issues in suits involving federal antitrust laws, 12 ALR Fed 831 § 12.

26. *Components, Inc. v Western Electric Co.* (DC Me) 318 F Supp 959, 167 USPQ 583, 1970 CCH Trade Cases ¶ 73370, 14 FR Serv 2d 774.

Annotations: 12 ALR Fed 831 § 13.

competition,²⁷ for breach of contract,²⁸ and for a judgment restraining the enforcement of a state statute because of its unconstitutionality.²⁹

§ 136. —Practice guide

From the viewpoint of defense counsel in an antitrust case, separate trials of liability and damages may be desirable inasmuch as they would exclude evidence not directly bearing on violation issues in the liability trial. However, many defense lawyers oppose separation of the various issues in an antitrust case, being of the opinion that the defendant should not be required to introduce evidence relating to any violation issue until the plaintiff has offered all its evidence and has rested its case in chief.

From the viewpoint of plaintiff's counsel, financial considerations may be paramount. If the plaintiff's finances are limited, and he must bear the expense of two trials, there is often a question whether the game is worth the candle.

e. PARTICULAR ISSUES OR CLAIMS [§§ 137-148]

(1) IN GENERAL [§§ 137-139]

§ 137. Preliminary issues

A separate trial under FRCP 42(b) may be ordered for preliminary matters, such as whether jurisdiction is proper,³⁰ and whether venue is correct.³¹ In the interest of judicial economy, a trial court will order a bifurcated trial under Rule 42(b) in an action under Title VII brought against an American corporation and its wholly owned foreign subsidiary, first, on the issue of whether the interrelationship between the corporations is such that they may be considered a single employer for purposes of Title VII, and, second, if a sufficient relationship be found, on the remaining issues in the cases.³²

On the other hand, where the preliminary issues are closely related to the merits of the action, they should not be separated.³³ Thus, for example, a

27. *Alarm Device Mfg. Co. v Alarm Products International, Inc.* (DC NY) 60 FRD 199, 177 USPQ 589, 1973-1 CCH Trade Cases ¶ 74434, 16 FR Serv 2d 1552; *Forstmann Woolen Co. v Alexander's Dept. Stores, Inc.* (DC NY) 11 FRD 405, 89 USPQ 183.

Annotations: 12 ALR Fed 831 § 14.

28. *Baxter Travenol Laboratories, Inc. v Le May* (SD Ohio) 536 F Supp 247, 217 USPQ 1312, 1985-1 CCH Trade Cases ¶ 66554, 34 FR Serv 2d 843; *Washington Whey Co. v Fairmont Foods Co.* (DC Neb) 72 FRD 180, 1976-2 CCH Trade Cases ¶ 61145, 22 FR Serv 2d 453; *Admiral Corp. v Cerullo Electric Supply Co.* (DC Pa) 32 FRD 379.

Annotations: 12 ALR Fed 831 § 15.

29. *Patterson Drug Co. v Kingery* (WD Va) 305 F Supp 821, 1970 CCH Trade Cases ¶ 73097 (disapproved on other grounds by Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council, Inc., 425 US 748, 48 L Ed 2d 346, 96 S Ct 1817, 1 Media L R 1930, 1976-1 CCH Trade Cases ¶ 60930).

Annotations: 12 ALR Fed 831 § 16.

30. *First Nat. Bank v National Airlines, Inc.* (CA2 NY) 288 F2d 621, 4 FR Serv 2d 770, cert den 368 US 859, 7 L Ed 2d 57, 82 S Ct 102; *Technical Tape Corp. v Minnesota Mining & Mfg. Co.* (DC NY) 117 F Supp 355, 100 USPQ 307; *Glaspell v Davis* (DC Or) 2 FRD 301.

Bifurcated trials are as available for the resolution of jurisdictional issues as they are to any other factual issues. *Bonner v Minico, Inc.*, 159 Ariz 246, 766 P2d 598, 22 Ariz Adv Rep 3.

31. *Clark v Lowden* (DC Minn) 48 F Supp 261, app dismd (CA8 Minn) 135 F2d 740; *Tague v Delaware, L. & W.R. Co.* (DC NY) 5 FRD 323, supp op (DC NY) 5 FRD 326.

32. *Lavrov v NCR Corp.* (SD Ohio) 600 F Supp 923.

33. *Smith v Sperling*, 354 US 91, 1 L Ed 2d 1205, 77 S Ct 1112, 68 ALR2d 805; *Marks Food Corp. v Barbara Ann Baking Co.* (CA9 Cal) 274 F2d 934, 2 FR Serv 2d 663, 3 FR Serv 2d 679; *Cain v Blumberg* (DC La) 51 F Supp 234.

separate trial on a statute of limitations issue would not further the purposes of FRCP 42(b), where (1) plaintiffs' fraudulent concealment and conspiracy claims are interrelated and will involve overlapping proofs at trial, (2) a factual finding in defendants' favor on the fraudulent concealment claims would not eliminate the need for a second trial on those of plaintiffs' claims which are within the limitations period, and (3) defendants failed to demonstrate that they would be improperly prejudiced by a single trial.³⁴ It has also been held that where defendant places himself in a no-win situation by pleading inconsistent positions on the issues of statute of limitations and liability, the trial court is not obliged to take unreasonable measures to increase defendant's ultimate chances of success by ordering a bifurcated trial on those issues.³⁵

§ 138. Legal and equitable issues

Where both legal and equitable issues exist in an action, they should be severed and the equitable issue tried first by the court,³⁶ since this procedure may obviate the necessity for a subsequent jury trial on the legal issue.³⁷ Some courts, however, take the view that where determination of the equitable issues would be conclusive as to the legal issues, the legal issues must be tried first in order to prevent abrogation of the right to a jury trial.³⁸ Other courts hold that the trial judge has discretion to determine the order in which these issues will be tried,³⁹ or that equitable issues may be tried by the court along with incidental legal issues, and thereafter a jury trial may be had on the main legal issue, such as liability.⁴⁰ It has also been held that the trial judge should order separate trials of legal and equitable claims, with the "at law" claim tried first if there are factual issues common to both claims, and if there are no common factual issues, it is within the trial court's discretion which claim will be tried first;⁴¹ however, the court subsequently modified its holding by stating that where a complaint is equitable and the counterclaim is legal and compulsory, the trial judge has the option of ordering separate trials or of ordering the claims tried in a single proceeding when convenience so directs.⁴²

34. *United Nat. Records, Inc. v MCA, Inc.* (ND Ill) 1 FR Serv 3d 579.

35. *Witherell v Weimer*, 118 Ill 2d 321, 113 Ill Dec 259, 515 NE2d 68.

36. *Radio Corp. of America v Raytheon Mfg. Co.*, 296 US 459, 80 L Ed 327, 56 S Ct 297; *Liberty Oil Co. v Condon Nat. Bank*, 260 US 235, 67 L Ed 232, 43 S Ct 118; *Bohall v Dilla*, 114 US 47, 29 L Ed 61, 5 S Ct 782; *Quinby v Conlan*, 104 US 420, 26 L Ed 800; *Sooy v Cerf*, 220 Cal 611, 32 P2d 365, 93 ALR 287; *Gordon v Palm Aire Country Club Condominium Asso. No. 9, Inc.* (Fla App D4) 497 So 2d 1284, 11 FLW 2359; *State ex rel. Rope v Borron* (Mo App) 762 SW2d 427; *State ex rel. McAdams v District Court of Eighth Judicial Dist.*, 105 NM 95, 728 P2d 1364.

37. *Wyle v Alioto* (1st Dist) 191 Cal App 3d 1128, 236 Cal Rptr 849, op withdrawn by order of ct.

Generally as to the right to a jury trial where equitable defense or counterclaim is pleaded, see 47 Am Jur 2d, Jury § 35.

Forms: Affidavit in support of motion for separate prior trial of issue—Allegation—Equitable nature of issue. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 46.

38. *Black & White Constr. Co. v Bolden Contractors, Inc.*, 187 Ga App 805, 371 SE2d 421.

39. *Harriman v Maddocks* (Me) 560 A2d 11.

Where a dispute between two parties involves matters of both law and equity, it is within the trial court's discretion to present the "mixed" issues to a jury for resolution of the factual disputes, or to sever the issues. *Smith v Orange County* (Fla App D5) 497 So 2d 985, 11 FLW 2436.

40. *State ex rel. McAdams v District Court of Eighth Judicial Dist.*, 105 NM 95, 728 P2d 1364.

41. *C & S Real Estate Services, Inc. v Massengale*, 290 SC 299, 350 SE2d 191.

42. See *Johnson v South Carolina Nat. Bank*, 292 SC 51, 354 SE2d 895.

§ 139. Issues of law and fact

Where there is an issue of law and another of fact in the same cause, usually the question of law will be heard and decided first, but this is a matter of sound discretion in the court.⁴³ Thus, where pleas to the jurisdiction and to the merits are joined in an answer, the court in its discretion may direct that the jurisdictional question be tried first.⁴⁴

(2) LIABILITY AND DAMAGES [§§ 140–144]

§ 140. Generally; bifurcated trial

In a growing number of jurisdictions and cases, it is generally held that the issue as to the liability of the defendant on the merits of the case may be tried separately from, and prior to, the issue as to the damages recoverable.⁴⁵ This is commonly referred to as a bifurcated trial.⁴⁶ Indeed, judges are encouraged to conduct bifurcated trials in personal injury actions where it appears that bifurcation may assist in a clarification or simplification of issues and in a fair or more expeditious resolution of the action.⁴⁷ Thus, bifurcation is proper where liability is based on hotly disputed facts and there are complex damages issues including whether certain injuries were caused by the accident or were the natural result of degeneration, all of which would require a tremendous amount of the trial court's time and expense.⁴⁸ However, the decision to hold separate trials on the issues of liability and damages is a matter within the sound discretion of the trial judge, and unless prejudice is shown, will not be reversed on appeal.⁴⁹

A bifurcated trial is normally appropriate unless the nature of the injuries

43. *Townsend v Jemison*, 48 US 706, 12 L Ed 880.

44. *Mertens v McMahon*, 334 Mo 175, 66 SW2d 127, 93 ALR 1285.

Generally as to determination of jurisdiction as a preliminary issue, see § 137.

45. *Palmer v A.H. Robins Co.* (Colo) 684 P2d 187, CCH Prod Liab Rep ¶ 10085, 38 UCCRS 1150; *Hunter v McDaniel Constr. Co.*, 274 Ark 178, 623 SW2d 196; *Swenson v Sawoska*, 18 Conn App 597, 559 A2d 1153, app gr, in part 212 Conn 810, 564 A2d 1073 and affd 215 Conn 148, 575 A2d 206; *Parks v Consolidated Freightways*, 187 Ga App 576, 370 SE2d 827; *Louise B.G. v New York City Bd. of Education* (2d Dept) 143 App Div 2d 728, 533 NYS2d 293, app den 73 NY2d 707, 540 NYS2d 238, 537 NE2d 623, reconsideration den 74 NY2d 714, 543 NYS2d 401, 541 NE2d 430; *Sacco v Scranton*, 115 Pa Cmwlth 512, 540 A2d 1370, app den 524 Pa 601, 568 A2d 1251.

Liability and damages are distinct and severable issues, which may be tried and determined separately. *Parmar v Skinner* (2d Dept) 154 App Div 2d 444, 546 NYS2d 16; *Louise B.G. v New York City Bd. of Education* (2d Dept) 143 App Div 2d 728, 533 NYS2d 293, app den 73 NY2d 707, 540 NYS2d 238, 537 NE2d 623, reconsideration den 74 NY2d 714, 543 NYS2d 401, 541 NE2d 430; *Tubular Products, Inc. v*

Jacobson (2d Dept) 138 App Div 2d 371, 525 NYS2d 655.

As to the separate trial of the issues of liability and damages under statutes and rules of court, see § 141.

Annotations: Separate trial of issues of liability and damages in tort, 85 ALR2d 9 §§ 3, 4.

46. § 115.

47. *Jochsberger v Morandi* (2d Dept) 157 App Div 2d 706, 549 NYS2d 806.

Bifurcation of issues of liability and damages at trial of medical malpractice action was not improper, despite plaintiff's assertion that by separating liability from damages jury was not able to fully separate injuries plaintiff sustained in auto accident and injury he sustained from doctor's alleged negligence, since injuries sustained in auto accident were not at issue in case. *Sellers v Baisier* (CA7 Ill) 792 F2d 690.

48. *Swenson v Sawoska*, 18 Conn App 597, 559 A2d 1153, app gr, in part 212 Conn 810, 564 A2d 1073 and affd 215 Conn 148, 575 A2d 206.

49. *Masaki v General Motors Corp.* (Hawaii) 780 P2d 566.

In action by miner against manufacturer of equipment that pinned him to coal rib, District Court did not abuse its discretion in bifurcating

has an important bearing on the issue of liability.⁵⁰ But the trial court should be alert to the danger that evidence relevant to both issues may be offered at only half of the trial; this hazard necessitates the determination that the issues are totally independent prior to bifurcation.⁵¹

■■■■ Observation: It has been noted that in tort actions, first resolving the liability issue may have the effect of eliminating the need for a second trial on damages in the event no liability is found. As a result, bifurcation is an attractive device in many tort proceedings.⁵²

Separate trials of issues of liability and damages arising out of an accident are proper, where both parties to the lawsuit agree to bifurcation.⁵³ Conversely, it has been recognized that a trial court may not sever the issues of liability and damages over the objection of a party.⁵⁴

■■■■ Caution: Bifurcated trials on the issues of liability and damages can be dangerous for plaintiffs. One study found that plaintiffs win in approximately 58 percent of cases tried as one, while their percentage of victories is reduced to approximately 21 percent of cases in which the liability issue is tried separately. Therefore, plaintiff's counsel should always argue strongly against bifurcation of liability and damages issues because bifurcation diminishes the impact of plaintiff's case.⁵⁵

§ 141. Under FRCP 42(b) or similar state rules

It is firmly established that the court's discretion in ordering a separate trial under FRCP 42(b) or similar state procedural rules includes the discretion to

liability and damages issues despite claim that extent of injury was relevant to question of manufacturer's negligence in marketing machinery. *Hines v Joy Mfg. Co.* (CA6 Ky) 850 F2d 1146, CCH Prod Liab Rep ¶ 11842, 25 Fed Rules Evid Serv 1452, 11 FR Serv 3d 838.

In an action in which a buyer of a house obtained both an award of damages resulting from the seller's failure to perform the contract for the sale of the house and an order requiring the seller to specifically perform the contract, the trial court did not abuse its discretion in bifurcating the issues of liability and damages where the amount of the damages could not be ascertained until the date of the seller's performance had been determined, in that the damages were calculated from the increase (between the time at which the seller had failed to perform and the time he did perform pursuant to the court decree) in the interest rate on an existing mortgage which the buyer was to assume at the closing. *Hernandez v Leiva* (Fla App D3) 391 So 2d 292.

Generally as to the trial court's discretion, see § 120.

50. *Gee v New York City Transit Authority* (2d Dept) 135 App Div 2d 778, 522 NYS2d 890; *Addesso v Belting Associates, Inc.* (2d Dept) 128 App Div 2d 489, 512 NYS2d 416.

In negligence action to recover damages for personal injuries, a complete trial embracing

both liability and damage issues was required, without being bifurcated, where plaintiffs needed to show a causal connection between certain of negligent acts alleged and injury sustained and medical proof was necessary. *Castelli v Regina Center, Inc.* (2d Dept) 54 App Div 2d 954, 388 NYS2d 632.

51. *Stevenson v General Motors Corp.*, 513 Pa 411, 521 A2d 413.

52. *Finkel v Finkel*, 120 Misc 2d 936, 466 NYS2d 906.

53. *Fields v Volkswagen of America, Inc.* (Okla) 555 P2d 48, 84 ALR3d 1199.

54. *Richter v Northwestern Memorial Hospital* (1st Dist) 177 Ill App 3d 247, 126 Ill Dec 584, 532 NE2d 269.

55. Practice guide: It has been suggested that plaintiff's counsel should study the law regarding bifurcation in the applicable jurisdiction, identify all distinguishing features in the case which militate against bifurcation, and secure and have on hand any published or unpublished opinions on the point from judges in the circuit or district. *Charfoos & Christensen, Personal Injury Practice: Technique and Technology* (1986) § 12:7.

See also 3 Am Jur Trials 553, *Selecting the Forum—Plaintiff's Position* § 28 (Separation of issues for trial).

order a separate trial on the issues of liability and damages.⁵⁶ Indeed, the ordering of a separate trial on the issue of liability and damages has been commended for it avoids prejudice by precluding consideration by the jury of evidence of injuries, which is relevant only to the question of damages,⁵⁷ and it promotes economy because if the defendant is found not liable there is no need for evidence to be presented on the issue of damages.⁵⁸ One court has noted that the better exercise of discretion would be to require that the issue of liability be resolved prior to the issue of damages.⁵⁹

■■■■ Observation: The rule in the Third Circuit since 1972 has been that the decision to bifurcate a trial so that there is a separate trial on the issue of liability and on the issue of damages is a matter to be decided on a case-by-case basis and must be subject to an informed discretion by the trial judge in each instance, and therefore a routine order of bifurcation in all negligence cases is a practice at odds with the requirement that discretion be exercised.⁶⁰ A showing of prejudice may not be necessary to justify a new trial if the trial court fails to support the decision to bifurcate with an explanation demonstrating its exercise of an informed discretion in the circumstances of the case.⁶¹ Some federal courts have promulgated rules providing that the court may order separate trials on the issues of liability and damages, and may hold a settlement conference after a finding of liability is made, but before the issue of damages is tried. The rules further provide that the court may order a single trial if a bifurcated trial would work a hardship on a party or cause undue delay or expense.⁶²

56. *Rosales v Honda Motor Co.* (CA5 Tex) 726 F2d 259, 38 FR Serv 2d 1175, 78 ALR Fed 883; *Re Master Key Antitrust Litigation* (CA2 Conn) 528 F2d 5, 1975-2 CCH Trade Cases ¶ 60648, 21 FR Serv 2d 276; *Warner v Rossignol* (CA1 Me) 513 F2d 678, later app (CA1 Me) 538 F2d 910; *Dewald v Minster Press Co.* (CA6 Mich) 494 F2d 795, 18 FR Serv 2d 699; *Idzajt v Pennsylvania R. Co.* (CA3 Pa) 456 F2d 1228, 15 FR Serv 2d 1459; *Moss v Associated Transport, Inc.* (CA6 Tenn) 344 F2d 23, 9 FR Serv 2d 42b.12, Case 4; *Beauchamp v Russell* (ND Ga) 547 F Supp 1191, CCH Prod Liab Rep ¶ 9537, 36 FR Serv 2d 1093; *Love v Pullman Co.* (DC Colo) 21 FR Serv 2d 629; *Durham v Southern R. Co.* (WD Va) 254 F Supp 813, 10 FR Serv 2d 1134.

The determination to conduct separate trials on the issues of liability and damages pursuant to Ohio CR 42(b), is committed to the sound discretion of the trial court. *Heidbreder v Northampton Township Trustees* (Summit Co) 64 Ohio App 2d 95, 18 Ohio Ops 3d 78, 411 NE2d 825.

Annotations: Separate trial of issues of liability and damages in tort, 85 ALR2d 9.

57. *Crummett v Corbin* (CA6 Ohio) 475 F2d 816, 70 Ohio Ops 2d 36, 17 FR Serv 2d 535.

58. *Love v Pullman Co.* (DC Colo) 21 FR Serv 2d 629; *Re Master Key Antitrust Litigation* (DC Conn) 70 FRD 23, 1975-1 CCH Trade Cases

¶ 60377, 20 FR Serv 2d 619, app dismd (CA2 Conn) 528 F2d 5, 1975-2 CCH Trade Cases ¶ 60648, 21 FR Serv 2d 276; *Hahn v Woodlyn Fire Co.* (ED Pa) 32 FRD 429, 7 FR Serv 2d 870; *Rickenbacher Transp., Inc. v Pennsylvania R. Co.* (DC NY) 3 FRD 202.

59. *Cale v Outboard Marine Corp.* (DC Wis) 48 FRD 328.

60. *Lis v Robert Packer Hospital* (CA3 Pa) 579 F2d 819, 3 Fed Rules Evid Serv 451, 25 FR Serv 2d 1108, cert den 439 US 955, 58 L Ed 2d 346, 99 S Ct 354.

In tort action, separate trial under FRCP 42(b) has been found appropriate where a personal injury action was brought by two employees against a railroad under the Federal Employers' Liability Act, and the question of the defendant's liability turned on the jury's determination of whether the railroad had been negligent with regard to equipment in the bed of a truck, the existence of taillights, the existence of mud flaps, and the condition of a window on the truck, where the jury would be able to determine the liability issue apart from damages. *Idzajt v Pennsylvania R. Co.* (CA3 Pa) 456 F2d 1228, 15 FR Serv 2d 1459.

61. *Lis v Robert Packer Hospital* (CA3 Pa) 579 F2d 819, 3 Fed Rules Evid Serv 451, 25 FR Serv 2d 1108, cert den 439 US 955, 58 L Ed 2d 346, 99 S Ct 354.

62. Consult local rules to determine their

■■■ *Practice guide:* The fact that state law does not allow a separate trial on issues of liability and damages does not have any bearing in a diversity action, as federal procedural rules control in such cases.⁶³

§ 142. —Particular types of actions

Separate trials of various issues have been considered and generally ordered in suits involving admiralty;⁶⁴ antitrust;⁶⁵ civil rights;⁶⁶ contracts;⁶⁷ negligence,⁶⁸ including personal injury or death;⁶⁹ patents and copyrights;⁷⁰ torts;⁷¹ trade-

current requisites and procedures.

63. *Sellers v Baisier* (CA7 Ill) 792 F2d 690; *Rosales v Honda Motor Co.* (CA5 Tex) 726 F2d 259, 38 FR Serv 2d 1175, 78 ALR Fed 883; *Moss v Associated Transport, Inc.* (CA6 Tenn) 344 F2d 23, 9 FR Serv 2d 42b.12, Case 4.

The provision in FRCP 42(b) for separate trial of separate issues, including those of liability and damages in personal injury suits, does not implicate primarily substantive, as opposed to procedural, rule, but rather falls within uncertain area between substance and procedure and is rationally capable of classification as either. *Rosales v Honda Motor Co.* (CA5 Tex) 726 F2d 259, 38 FR Serv 2d 1175, 78 ALR Fed 883.

64. See 2 Am Jur 2d, Admiralty § 197.

65. § 134.

66. *Barnell v Paine Webber Jackson & Curtis, Inc.* (SD NY) 577 F Supp 976, 35 BNA FEP Cas 124, later proceeding (SD NY) 614 F Supp 373, 44 BNA FEP Cas 563; *EEOC v Lucky Stores* (ED Cal) 30 CCH EPD ¶ 33232, 37 FR Serv 2d 333.

For cases denying separate trials of issues, see *Bunch v Bullard* (CA5 Miss) 795 F2d 384, 41 BNA FEP Cas 515, 41 CCH EPD ¶ 36638 (disagreed with on other grounds by Atonio v Wards Cove Packing Co. (CA9 Wash) 810 F2d 1477, 43 BNA FEP Cas 130, 42 CCH EPD ¶ 36809, later proceeding (CA9 Wash) 827 F2d 439, 47 BNA FEP Cas 163, 44 CCH EPD ¶ 37367, cert den 485 US 989, 99 L Ed 2d 503, 108 S Ct 1293, 47 BNA FEP Cas 176, 46 CCH EPD ¶ 37879, reh den 487 US 1264, 101 L Ed 2d 977, 109 S Ct 27 and cert gr, in part 487 US 1232, 101 L Ed 2d 930, 108 S Ct 2896 and revd 490 US 642, 104 L Ed 2d 733, 109 S Ct 2115, 49 BNA FEP Cas 1519, 50 CCH EPD ¶ 39021, motion den (US) 107 L Ed 2d 9, 110 S Ct 38 and on remand (WD Wash) 54 BNA FEP Cas 1623); *Lowe v Philadelphia Newspapers, Inc.* (ED Pa) 594 F Supp 123, 54 BNA FEP Cas 167, 79 ALR Fed 207.

Annotations: Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in civil rights actions, 79 ALR Fed 220.

67. *O'Malley v United States Fidelity & Guaranty Co.* (CA5 Miss) 776 F2d 494; *Schmidt v California State Auto. Asso.* (DC Nev) 127 FRD 182, 15 FR Serv 3d 587.

For cases denying separate trial of issues, see *Compagnie Francaise d'Assurance Pour le Commerce Extérieur v Phillips Petroleum Co.* (SD NY) 105 FRD 16, 1 FR Serv 3d 167, 79 ALR Fed 763 (disagreed with by multiple cases as stated in *Re Sealed Case*, 263 App DC 357, 825 F2d 494, 23 Fed Rules Evid Serv 494, cert den 484 US 963, 98 L Ed 2d 391, 108 S Ct 451); *Candelaria Industries, Inc. v Occidental Petroleum Corp.* (DC Nev) 662 F Supp 1002, 95 OGR 140.

Annotations: Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in contract actions, 79 ALR Fed 812.

68. *Lisa v Fournier Marine Corp.* (CA1 Mass) 866 F2d 530, cert den (US) 107 L Ed 2d 41, 110 S Ct 75; *Kurkierewicz v Loewen* (DC Mont) 109 FRD 601.

69. *Re Bendectin Litigation* (CA6 Ohio) 857 F2d 290, 11 FR Serv 3d 1267, cert den 488 US 1006, 102 L Ed 2d 779, 109 S Ct 788; *Hines v Joy Mfg. Co.* (CA6 Ky) 850 F2d 1146, CCH Prod Liab Rep ¶ 11842, 25 Fed Rules Evid Serv 1452, 11 FR Serv 3d 838; *Rosales v Honda Motor Co.* (CA5 Tex) 726 F2d 259, 38 FR Serv 2d 1175, 78 ALR Fed 883.

Annotations: Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving personal injury, death, or property damage, 78 ALR Fed 890.

70. *Chubb Integrated Systems, Inc. v National Bank of Washington* (DC Dist Col) 658 F Supp 1043, 3 USPQ2d 1519; *Paine, Webber, Jackson & Curtis, Inc. v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (DC Del) 587 F Supp 1112, 223 USPQ 888, 38 FR Serv 2d 1070, 79 ALR Fed 521; *Troncoso v Martin Archery, Inc.* (ED Wash) 127 FRD 190, 11 USPQ2d 1231.

For cases denying bifurcation or separate trial of issues, see *Willemijn Houdstermaatschappij BV v Apollo Computer, Inc.* (DC Del) 707 F Supp 1429; *Intersong-USA, Inc. v CBS,*

marks;⁷² and various other types of litigation.⁷³

§ 143. Requisites, tests, and factors

Ordinarily, to warrant a prior trial of the issue of liability, it must appear that it is separate and distinct from the issue as to damages,⁷⁴ that such separate trial will not operate to the prejudice of a party⁷⁵ or will avoid prejudice to a party,⁷⁶ and that it will expedite the litigation or lessen the cost thereof.⁷⁷

Inc. (SD NY) 1 FR Serv 3d 609; *Bridgestone Trading Co. v Envoys U.S.A., Inc.* (ND Ohio) 37 FR Serv 2d 1295.

Annotations: Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving patents and copyrights, 79 ALR Fed 532.

71. *R.E. Linder Steel Erection Co. v Wedemeyer, Cernik, Corrubia, Inc.* (DC Md) 585 F Supp 1530 (bifurcation of issues held inappropriate under circumstances).

72. *Max Daetwyler Corp. v Input Graphics, Inc.* (ED Pa) 608 F Supp 1549, 226 USPQ 393 (severance of Lanham Act claim from patent infringement claim and patent invalidity counterclaim denied); *Nylok Fastener Corp. v Industrial Nut Corp.* (ND Ohio) 122 FRD 512, 8 USPQ2d 1092 (bifurcation of issues denied).

73. *United States v 1071.08 Acres of Land* (CA9 Ariz) 564 F2d 1350, 24 FR Serv 2d 934 (condemnation); *United States v Mottolo* (DC NH) 107 FRD 267, summary judgment gr, in part, summary judgment den, in part (DC NH) 695 F Supp 615, 19 ELR 20442, later proceeding (DC NH) 1990 US Dist LEXIS 18590 and (disapproved by *Joslyn Mfg. Co. v T.L. James & Co.* (CA5 La) 893 F2d 80, 20 ELR 20382, reh den (CA5) 1990 US App LEXIS 6373, later proceeding (US) 112 L Ed 2d 11, 111 S Ct 34 and cert den (US) 112 L Ed 2d 1098, 111 S Ct 1017) (suit for reimbursement of costs of hazardous waste site cleanup); *Rollins v Sears, Roebuck & Co.* (ED La) 71 FRD 540, 21 FR Serv 2d 1088 (claim under Truth in Lending Act); *State Mut. Life Assur. Co. v Arthur Andersen & Co.* (DC NY) 63 FRD 389, CCH Fed Secur L Rep ¶ 94706, later proceeding (SD NY) CCH Fed Secur L Rep ¶ 94954 (securities fraud).

74. *United Air Lines, Inc. v Wiener* (CA9 Cal) 286 F2d 302, 4 FR Serv 2d 766, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1352, later proceeding (CA9 Cal) 335 F2d 379, 8 FR Serv 2d 49b.42, Case 1, cert dismd 379 US 951, 13 L Ed 2d 549, 85 S Ct 452; *Vander Veer v Toyota Motor Distributors, Inc.*, 282 Or 135, 577 P2d 1343.

In suit arising out of airplane crash, evidence used to prove liability under wrongful death

theory would not need to be used to prove damages so that such suit is properly bifurcated into separate trials for liability and damages. *Stoddard v Ling-Temco-Vought, Inc.* (CD Cal) 513 F Supp 314, remanded (CA9 Cal) 711 F2d 1431, CCH Prod Liab Rep ¶ 9763, 37 FR Serv 2d 131 (disagreed with on other grounds by *Lone Star Industries, Inc. v Mays Towing Co.* (CA8) 1991 US App LEXIS 4444).

In complex litigation, separate trials on issues of liability and damages would be ordered where proof that would be introduced as to liability issues would be in large part common to all plaintiffs, but proof as to damages was likely to be much more individualized, and proof of damages suffered would be possible without detailed reference to liability issues. In *Re Master Key Antitrust Litigation* (DC Conn) 70 FRD 23, 1975-1 CCH Trade Cases ¶ 60377, 20 FR Serv 2d 619, app dismd (CA2 Conn) 528 F2d 5, 1975-2 CCH Trade Cases ¶ 60648, 21 FR Serv 2d 276.

75. *United Air Lines, Inc. v Wiener* (CA9 Cal) 286 F2d 302, 4 FR Serv 2d 766, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1352, later proceeding (CA9 Cal) 335 F2d 379, 8 FR Serv 2d 49b.42, Case 1, cert dismd 379 US 951, 13 L Ed 2d 549, 85 S Ct 452.

76. *Hamilton v Gallo*, 233 Pa Super 476, 334 A2d 692.

Trial court's decision to sever issue of non-manufacture of swimming pool slide from remainder of case was not abuse of discretion where evidence of damages and severity of plaintiff's injuries might be prejudicial to defendant and proof would have taken several days. *Beeck v Aquaslide 'N' Dive Corp.* (CA8 Iowa) 562 F2d 537, 24 FR Serv 2d 1, later proceeding (Iowa) 302 NW2d 90, later app (Iowa) 350 NW2d 149.

77. *Hosie v Chicago & N.W.R. Co.* (CA7 Ill) 282 F2d 639, 3 FR Serv 2d 753, cert den 365 US 814, 5 L Ed 2d 693, 81 S Ct 695.

Court's decision to order split trial subsequent to commencement of plaintiff's case was not abuse of discretion where plaintiff's medical expert could not appear until later date and where expert's testimony would primarily concern issue of damages. *Kisteneff v Tiernan* (CA1 RI) 514 F2d 896, 20 FR Serv 2d 492.

§ 144. Refusal of bifurcated trial; grounds

Separate prior trial of the issue of liability has in many cases been held not permissible or proper, either generally or because of the particular circumstances involved.⁷⁸ Thus, where the question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty amounting to the denial of fair trial, separate trial of the damage and liability issues should not be ordered.⁷⁹ Similarly, separation is not proper where the issues of liability and damages were not so distinct so that they could be presented to the jury independently without confusion and uncertainty amounting to the denial of a fair trial.⁸⁰ Likewise, where evidence will be duplicated in a trial on liability and a separate trial on damages, separate trials should not be ordered.⁸¹

Severance of defendant's recently added damage claims on its counterclaims was appropriate, since necessary discovery could not be completed by trial date, and plaintiff's damage claims would also be severed, since severing both parties' damage claims and trying liability issues first might result in substantial judicial economy, especially in light of complexity of damage issues in case. *American Home Products Corp. v Johnson & Johnson* (SD NY) 111 FRD 448, 5 FR Serv 3d 581, later proceeding (SD NY) 654 F Supp 568.

78. *United Air Lines, Inc. v Wiener* (CA9 Cal) 286 F2d 302, 4 FR Serv 2d 766, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1352, later proceeding (CA9 Cal) 335 F2d 379, 8 FR Serv 2d 49b.42, Case 1, cert dismd 379 US 951, 13 L Ed 2d 549, 85 S Ct 452; *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165 (not necessary); *State Farm Mut. Auto. Ins. Co. v Clark* (Fla App D4) 544 So 2d 1141, 14 FLW 1418 (not necessary under the facts); *Steinbrecher v McLeod Cooperative Power Assn.* (Minn App) 392 NW2d 709 (not an abuse of discretion in holding single trial); *Iley v Hughes*, 158 Tex 362, 311 SW2d 648, 85 ALR2d 1; *Jensen v Beard*, 40 Wash App 1, 696 P2d 612, review den 103 Wash 2d 1038.

79. *Response of Carolina, Inc. v Leasco Response, Inc.* (CA5 Fla) 537 F2d 1307, 1976-2 CCH Trade Cases ¶ 61045, 22 FR Serv 2d 377; *United Air Lines, Inc. v Wiener* (CA9 Cal) 286 F2d 302, 4 FR Serv 2d 766, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1352, later proceeding (CA9 Cal) 335 F2d 379, 8 FR Serv 2d 49b.42, Case 1, cert dismd 379 US 951, 13 L Ed 2d 549, 85 S Ct 452; *Hardee Mfg. Co. v Josey* (Fla App D3) 535 So 2d 655, 14 FLW 15 (holding that factors concerning cause and nature of injuries would, unavoidably, have been adduced at separate trial on liability); *De Gregorio v Lutheran Medical Center* (2d Dept) 142 App Div 2d 543, 529 NYS2d 903 (evidence on damages was important on issue of liability, as showing severity of struggle and rebutting de-

fendant's claim of self-defense); *Stevenson v General Motors Corp.*, 513 Pa 411, 521 A2d 413; *Ennix v Clay* (Tenn) 703 SW2d 137.

Trial court acted within its sound discretion in deciding upon manner in which malpractice suit should properly proceed, including determination of whether malpractice issue should be bifurcated for damages, where liability issue, with regard to underlying accident case, as well as collectability of any award therein, was essential to determination of amount of damages flowing from counsel's malpractice in failing to properly prosecute claim. *Cotton v Travaline*, 179 NJ Super 362, 432 A2d 122.

In dog-bite case where location of injuries on plaintiff as well as nature, extent, and gravity of injuries were factors in determining both liability defenses and damages, issues of liability and damages were so intertwined that justice would be better served by having unified trial. *Leiner v First Wythe Ave. Service Station, Inc.*, 121 Misc 2d 559, 468 NYS2d 302, later proceeding 127 Misc 2d 794, 492 NYS2d 708.

80. *United Air Lines, Inc. v Wiener* (CA9 Cal) 286 F2d 302, 4 FR Serv 2d 766, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1352, later proceeding (CA9 Cal) 335 F2d 379, 8 FR Serv 2d 49b.42, Case 1, cert dismd 379 US 951, 13 L Ed 2d 549, 85 S Ct 452.

81. *United States v Marietta Mfg. Co.* (DC W Va) 53 FRD 390.

In action brought under 15 USCS § 15, motion for bifurcation of liability question from damages was provisionally denied, since even though inquiry into issue of causation or fact of damage was analytically distinct from extent or amount of damage, proof addressed to one issue would be probative of others; even if bifurcation were granted, each of 35 plaintiffs would have had to establish fact of damage at liability trial. *Broadway Delivery Corp. v United Parcel Service, Inc.* (SD NY) 74 FRD 438, 1977-2 CCH Trade Cases ¶ 61688, 25 FR Serv 2d 792.

Bifurcation of trial of the issues of liability and damages has also been refused where:

- both issues raised jury questions and bifurcation would require the court to choose between having one jury hear both trials or impaneling a different jury for each trial.⁸²
- the jury was required to compare the fault of the manufacturer of a faulty product and plaintiff's employer, so that a bifurcated proceeding would defeat the policy reasons behind the state's Contribution Act.⁸³
- few witnesses were involved, testimony on the injuries was relevant to the liability issue, and the evidence of contributory negligence was not overwhelming.⁸⁴

■■■ Observation: Bifurcation may be denied where it is unnecessary to avoid prejudice.⁸⁵ Thus, bifurcation of the issues of liability and damages is improper where the trial court resolves any potential problem of sympathy, passion and prejudice that might be aroused in the jury upon introduction of certain emotionally charged evidence, by issuing a pretrial order excluding such evidence,⁸⁶ or by giving cautionary instructions to the jury.⁸⁷

(3) OTHER ISSUES OR CLAIMS [§§ 145–148]

§ 145. Punitive damages

When an adequate showing is made by defendant, the trial court may grant a bifurcated trial on the issue of punitive damages in the interest of justice and to avoid any undue prejudice during the liability phase of the trial.⁸⁸ A bifurcated trial on the issue of punitive damages does not constitute or result in a “separate cause of action.”⁸⁹

However, the decision to hold a separate trial on the issue of punitive damages is a matter within the sound discretion of the trial judge, and unless

82. *Compagnie Francaise d'Assurance Pour le Commerce Extérieur v Phillips Petroleum Co.* (SD NY) 105 FRD 16, 1 FR Serv 3d 167, 79 ALR Fed 763 (disagreed with by multiple cases as stated in *Re Sealed Case*, 263 App DC 357, 825 F2d 494, 23 Fed Rules Evid Serv 494, cert den 484 US 963, 98 L Ed 2d 391, 108 S Ct 451).

83. *Suich v H & B Printing Machinery, Inc.* (1st Dist) 185 Ill App 3d 863, 133 Ill Dec 768, 541 NE2d 1206, CCH Prod Liab Rep ¶ 12245, app den (Ill) 139 Ill Dec 522, 548 NE2d 1078.

84. *Randolph v Scott* (Del Super) 338 A2d 135.

85. *Wertz v Kephart*, 374 Pa Super 274, 542 A2d 1019, app den 520 Pa 618, 554 A2d 510 and app den 520 Pa 619, 554 A2d 511.

It was not error for trial court to refuse to bifurcate trial on issues of liability and damages where plaintiff, who was severely injured in motorcycle accident, might have had to testify in liability phase and in such case jury would have been well aware of nature and extent of

injuries despite bifurcation. *Cota v Harley Davidson, Div. of AMF, Inc.* (App) 141 Ariz 7, 684 P2d 888, CCH Prod Liab Rep ¶ 10013.

86. *Grosfield v Clearwater Clinic* (Minn) 417 NW2d 640.

87. *Kociemba v G.D. Searle & Co.* (DC Minn) 683 F Supp 1577, later proceeding (DC Minn) 683 F Supp 1579, CCH Prod Liab Rep ¶ 11870, 26 Fed Rules Evid Serv 499, later proceeding (DC Minn) 683 F Supp 1582, 26 Fed Rules Evid Serv 495.

88. *Tillery v Lynn* (SD NY) 607 F Supp 399 (applying NY law); *Palmer v A.H. Robins Co.* (Colo) 684 P2d 187, CCH Prod Liab Rep ¶ 10085, 38 UCCRS 1150; *Moore v Thompson*, 255 Ga 236, 336 SE2d 749, later proceeding 177 Ga App 675, 342 SE2d 27, later proceeding 187 Ga App 672, 371 SE2d 111.

89. *Gard v Raymark Industries, Inc.* (2nd Dist) 185 Cal App 3d 583, 229 Cal Rptr 861, CCH Prod Liab Rep ¶ 11372, op withdrawn by order of ct.

prejudice is shown, will not be reversed on appeal.⁹⁰ Separate trial is properly denied where the issue of exemplary or punitive damages in any case is so interwoven with the proof first of negligence and secondly of willfulness, wantonness, malice or oppression, that their separation for decision by a single jury seriatim or by different juries is an abuse of discretion by the court, which would result in extended and needless litigation.⁹¹

Observation: In some jurisdictions, a statute may require that the same jury that finds a defendant liable for compensatory damages must also determine whether the defendant is liable for punitive damages.⁹² And a few jurisdictions follow a so-called "Wyoming Plan," which provides for a bifurcated trial if evidence is produced at trial making a *prima facie* case of punitive damages.⁹³

§ 146. Validity and effect of release

The granting of a separate trial on the issues of tort liability and the validity or effect of a release is recognized to be a matter within the sound discretion of the trial court.⁹⁴ However, in at least one jurisdiction it has been the settled

90. *Masaki v General Motors Corp.* (Hawaii) 780 P2d 566.

In action by insured alleging that defendant insurer breached insurance contract by refusing to pay on fire loss claim, trial court does not err in not ordering separate trials on insurer's defense of arson and insured's claim for punitive damages, where it is clear that punitive damages claim does not rise or fall with insurer's decision to raise arson defense or legal sufficiency of that defense. *T.D.S., Inc. v Shelby Mut. Ins. Co.* (CA11 Fla) 760 F2d 1520, reh gr, in part, mod, reh den, in part on other grounds (CA11 Fla) 769 F2d 1485.

There was no abuse of discretion or prejudice to a party by trying a breach of contract issue with the issue of punitive damages. *Berry v Nationwide Mut. Fire Ins. Co.* (W Va) 381 SE2d 367.

91. *State ex rel. Fitzgerald v District Court of Eighth Judicial Dist.,* 217 Mont 106, 703 P2d 148.

In action by insured alleging that defendant insurer breached insurance contract by refusing to pay on fire loss claim, trial court does not err in not ordering separate trials on insurer's defense of arson and insured's claim for punitive damages, where it is clear that punitive damages claim does not rise or fall with insurer's decision to raise arson defense or legal sufficiency of that defense. *T.D.S., Inc. v Shelby Mut. Ins. Co.* (CA11 Fla) 760 F2d 1520, reh gr, in part, mod, reh den, in part (CA11 Fla) 769 F2d 1485.

92. *Medo v Superior Court* (1st Dist) 205 Cal App 3d 64, 251 Cal Rptr 924.

93. *Miller v O'Neill* (Tex App Houston (1st Dist)) 775 SW2d 56, citing *Campan v Stone* (Wyo) 635 P2d 1121, 32 ALR4th 410.

The Wyoming Supreme Court in the *Campan* case relied heavily on the availability of pretrial discovery in determining that a bifurcated trial was a feasible procedure. The Plan allows defendant to move for a protective order requiring plaintiff who claims a right to punitive damages in his complaint, to make a *prima facie* showing to the court that a viable issue exists for such damages, and upon such a showing, pretrial discovery of information concerning defendant's net worth would be allowed.

In this connection, see also *Rupert v Sellers* (4th Dept) 48 App Div 2d 265, 368 NYS2d 904, holding that, in action for libel, slander, unfair insurance practices, and wrongful interference with contract, a split trial procedure would be used on issue of punitive damages, and defendants would not be required to submit sworn statements of net worth unless jury returned special verdict adjudging defendants guilty of conduct entitling plaintiff to punitive damages.

94. *Locke v Atchison, T. & S.F.R. Co.* (CA10 Colo) 309 F2d 811, 6 FR Serv 2d 879; *Mannke v Benjamin Moore & Co.* (WD Pa) 251 F Supp 1017, affd (CA3 Pa) 375 F2d 281, 10 FR Serv 2d 1328; *Legare v Urso*, 100 RI 391, 216 A2d 506; *Lumbermens Mut. Casualty Co. v Royal Indem. Co.*, 10 Wis 2d 380, 103 NW2d 69.

Generally as to separate trial of issues in tort actions, see § 132.

Annotations: Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 ALR3d 456 § 4.

Forms: Order for prior separate trial to determine validity of release. 21 Am Jur Pl & Pr Forms (Rev), Release, Form 36.

rule that in a tort action a litigant has a constitutional right to have all the issues tried at the same time by the same jury.⁹⁵

Many factors other than their discretionary powers have been considered by the courts in deciding whether to allow a separate trial on the issue of the validity of a release in a tort action, including convenience of the court and the parties⁹⁶ and prejudice or partiality to any of the litigants.⁹⁷

In allowing separate trials in order to avoid prejudice, the courts have considered the following factors: (1) when a negligence action involves a release, the release issue is often disregarded by the jury, (2) a single trial creates an atmosphere which would produce an unconscious influence upon the jury, (3) a single trial might confuse the jury,⁹⁸ and (4) in a single trial the jury would learn of the existence of insurance coverage, and this would be prejudicial to the defendant.⁹⁹

One of the main factors considered by the court in allowing separate trials for matters of convenience is the fact that if the release is valid the litigation would be at an end, and time and expense are saved for the court and all parties involved.¹ Separate trials have also been allowed on the basis that the question involved in determining the validity of a release in no way affected the main issue of negligence.²

On the other hand, separate trials on the issues of negligence and validity of a release have been denied for various reasons, including laches on the part of

—Order granting separate prior trial of issues raised by defense of release—Statement of issues of fact to be tried. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 48.

95. *Winters v Floyd*, 51 Tenn App 298, 367 SW2d 288, 4 ALR3d 450.

In action by purchaser of airliner against airliner manufacturer, arising from airliner explosion during maintenance procedures, trial court properly held separate trial as to validity of exculpation clause in airliner purchase agreement, where separate trial of issue did not deny purchaser right to jury trial, inasmuch as no right to jury trial existed, and where both parties stipulated to separate trial of exculpation issue. *Airlift International, Inc. v McDonnell Douglas Corp.* (CA9 Cal) 685 F2d 267 (ovrld on other grounds by Re Complaint of McLinn (CA9 Alaska) 739 F2d 1395, 1985 AMC 2408, later proceeding (CA9 Alaska) 744 F2d 677, 1985 AMC 2339, later proceeding (CA9 Alaska) 857 F2d 571, 26 Fed Rules Evid Serv 985, amd, reh den, en banc (CA9) 1988 US App LEXIS 19181 and cert den (US) 111 L Ed 2d 783, 110 S Ct 3273 and op replaced (CA9 Alaska) 892 F2d 763, 1990 AMC 2085 and (disagreed with on other grounds by multiple cases as stated in *United States v Hohri*, 482 US 64, 96 L Ed 2d 51, 107 S Ct 2246, on remand (CA FC) 847 F2d 779, cert den 488 US 925, 102 L Ed 2d 326, 109 S Ct 307)).

Annotations: 4 ALR3d 456 § 9.

96. *State ex rel. Northern P.R. Co. v District Court of Sixteenth Judicial Dist.*, 155 Mont 91,

467 P2d 145; *Wojcik v Pollock*, 97 NJ Super 319, 235 A2d 58; *Mendenhall v Vandeverter*, 61 NM 277, 299 P2d 457; *Chatman v Ferd Staffel Co.* (Tex Civ App Waco) 362 SW2d 173, writ ref n r e (Feb 13, 1963).

Annotations: 4 ALR3d 456 § 6.

97. *State ex rel. Northern P.R. Co. v District Court of Sixteenth Judicial Dist.*, 155 Mont 91, 467 P2d 145; *Wojcik v Pollock*, 97 NJ Super 319, 235 A2d 58; *Polmanteer v Nationwide Mut. Ins. Co.*, 60 Misc 2d 371, 303 NYS2d 146.

Annotations: 4 ALR3d 456 § 7.

98. *Hoad v New York C.R. Co.* (DC NY) 3 F Supp 1020; *Nesbitt v Hauck* (DC SD) 15 FRD 254; *Mendenhall v Vandeverter*, 61 NM 277, 299 P2d 457.

Annotations: 4 ALR3d 456 § 7[a].

99. *Larsen v Powell* (DC Colo) 16 FRD 322; *Davis v Marquardt*, 20 Ariz App 372, 513 P2d 379; *Jones v Massingale*, 251 SC 456, 163 SE2d 217 (denying dual trials despite contention).

Annotations: 4 ALR3d 456 § 8.

1. *Mendenhall v Vandeverter*, 61 NM 277, 299 P2d 457; *Starr v Johnsen* (2d Dept) 143 App Div 2d 130, 531 NYS2d 589.

Annotations: 4 ALR3d 456 § 6[a].

2. *Holt v Granite City Steel Co.* (DC Ill) 22 FRD 65; *Cohn v Bugas* (1st Dist) 42 Cal App 3d 381, 116 Cal Rptr 810.

Annotations: 4 ALR3d 456 § 5.

the defendant in making the motion,³ and the failure to properly plead or put the defense of release into issue.⁴ Other reasons for the denial of separate trials are the following: (1) to a large extent the same evidence is admissible as to both of the issues of negligence and validity of a release, (2) a multiplicity of suits and other resulting hardship and expense of two trials should be avoided, (3) the issues could not profitably be tried separately, and (4) one of the parties to the action was not a party to the release.⁵ Separate trials have also been denied on the basis that there was no showing of any possible prejudice or because any resulting prejudice was outweighed by other factors.⁶

§ 147. Counterclaims, cross-claims, or third-party claims

It is a matter within the trial court's discretion to order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims or issues, and the court may do so in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.⁷ State procedure rules may give the trial court a broad discretion in the matter of granting a motion for severance of a third-party claim for trial separately from that on the main issue.⁸

3. *Carmosin v New York C.R. Co.*, 198 App Div 810, 190 NYS 864.

Annotations: 4 ALR3d 456 § 4.

4. *Barker v Conley*, 267 NY 43, 195 NE 677.

Annotations: 4 ALR3d 456 § 4.

5. *Grissom v Union P.R. Co.* (DC Colo) 14 FRD 263; *Fleischman v Harwood* (DC NY) 10 FRD 139; *Winters v Floyd*, 51 Tenn App 298, 367 SW2d 288, 4 ALR3d 450.

Annotations: 4 ALR3d 456 § 6[b].

6. *Grissom v Union P.R. Co.* (DC Colo) 14 FRD 263; *Clark v Atlantic Stevedoring Co.* (DC NY) 3 FRD 35.

Annotations: 4 ALR3d 456 § 7[b].

7. *Ex parte Palughi* (Ala) 494 So 2d 404; *Equitable Life Assurance Society v Berry* (6th Dist) 212 Cal App 3d 832, 260 Cal Rptr 819, review den; *Roberson v Central Fidelity Bank*, 190 Ga App 382, 378 SE2d 698; *Perimeter Exhibits, Ltd. v Glenbard Molded Binder, Inc.* (2d Dist) 122 Ill App 3d 504, 77 Ill Dec 657, 461 NE2d 44; *Galloway v Zuckert* (Iowa) 424 NW2d 437, 82 ALR4th 1107, later app (Iowa App) 447 NW2d 553, cert den (US) 108 L Ed 2d 765, 110 S Ct 1526; *Rodgers v Acuncius* (Mo App) 736 SW2d 424; *Kelly v Yannotti*, 4 NY2d 603, 176 NYS2d 637, 152 NE2d 69, conformed to (2d Dept) 6 App Div 2d 1046, 179 NYS2d 653; *Avocet Dev. Corp. v McLean Bank*, 234 Va 658, 364 SE2d 757, 5 UCCRS2d 1424.

Severance of a counterclaim to avoid unreasonable delay of a new trial is proper. *Carter v Chicago & I.M.R. Co.* (4th Dist) 140 Ill App 3d 25, 94 Ill Dec 390, 487 NE2d 1267, later

proceeding (4th Dist) 144 Ill App 3d 437, 98 Ill Dec 770, 494 NE2d 892, revd 119 Ill 2d 296, 116 Ill Dec 210, 518 NE2d 1031, on remand (4th Dist) 168 Ill App 3d 652, 119 Ill Dec 194, 522 NE2d 856 (disagreed with by *Schmall v Addison* (2d Dist) 171 Ill App 3d 344, 121 Ill Dec 452, 525 NE2d 258, app den 122 Ill 2d 594, 125 Ill Dec 236, 530 NE2d 264) and app den 122 Ill 2d 571, 125 Ill Dec 212, 530 NE2d 240.

The trial court did not abuse its discretion in ordering separate trial of a counterclaim for damages where the main issues involving permanent injunction and contempt were to be tried by the court and the counterclaim was to be tried before a jury, and the jury might have become confused as to what issues and facts they were to decide. In addition, it would be very inconvenient to the parties not involved in the counterclaim to have to attend the days of trial which solely addressed the issue of the counterclaim, and it might be prejudicial for the jury to hear evidence which was relevant solely to the injunction and contempt issues. *Fairfield Commons Condominium Asso. v Stasa* (Lucas Co) 30 Ohio App 3d 11, 30 Ohio BR 49, 506 NE2d 237, cert den 479 US 1055, 93 L Ed 2d 981, 107 S Ct 930.

Forms: Motion to sever action—Joinder of third-party defendant. 1 Am Jur Pl & Pr Forms (Rev), Actions, Forms 41, 42.

—Motion and notice to sever third-party claim and for separate trial. 11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Form 1439.

8. *Michaels v Kessler*, 191 Ga App 103, 381 SE2d 103.

Under the state's civil procedure rules, sepa-

Counterclaims or cross-claims tried separately may result in separate judgments in the same action.⁹

Severance is appropriate where there is little or no overlap between the issues raised by the complaint and the counterclaim.¹⁰ And severance with respect to a cross-complaint for declaratory relief is proper where judgment for defendant would end the main lawsuit.¹¹

A court does not abuse its discretion in severing for separate trial a third-party claim based on the determination that presentation of the case in a joint trial would unduly complicate the trial and lead to confusion by the jury.¹² But a trial court's finding that, without separating the third-party claims the case will be "unduly complicated" and very difficult for the jury to comprehend, must be supported by facts, either in the trial court's order or in the record.¹³ Furthermore, a finding of complexity alone does not automatically entitle a party to the severance of third-party claims; the intent of the rules of procedure is that all issues be resolved in one action, with all parties before one court, complex though the action may be.¹⁴ And where to allow such claims to be separated from the pending main action not only would defeat the purpose of the rules, but also could endanger plaintiffs' rights to litigate these issues at a later time, separation of the claims is improper.¹⁵ If the main claim and counterclaim arise out of the same transactions and operative facts, the issues raised by them may be so intertwined that separate adjudication would pose an unreasonable risk of inconsistent results, and in such a case both issues should be tried together.¹⁶

§ 148. Other issues or claims

There is some authority recognizing that the issue of gross negligence, while not a separate and independent cause of action, may be tried and determined separately from the issue of negligence.¹⁷ And a claim of abusive litigation is to be decided in a bifurcated proceeding after the disposition of the underlying action.¹⁸ Other issues or claims which have been held to be properly tried separately include:

rate trials may be ordered under third party practice, but this is purely permissive on the part of the trial court. *Berry v Nationwide Mut. Fire Ins. Co.* (W Va) 381 SE2d 367.

9. *Neylan v Moser* (Iowa) 400 NW2d 538, later proceeding (Iowa) 439 NW2d 855 (counterclaim alleging malpractice by attorney who sued to enforce contingent fee agreement).

10. *American Home Products Corp. v Johnson & Johnson* (SD NY) 111 FRD 448, 5 FR Serv 3d 581, later proceeding (SD NY) 654 F Supp 568.

11. *Equitable Life Assurance Society v Berry* (6th Dist) 212 Cal App 3d 832, 260 Cal Rptr 819, review den.

12. *Kosters v Seven-Up Co.* (CA6 Mich) 595 F2d 347.

13. *Ex parte Duncan Constr. Co.* (Ala) 460 So 2d 852.

14. *Ex parte Palughi* (Ala) 494 So 2d 404; *Ex parte Duncan Constr. Co.* (Ala) 460 So 2d 852.

15. *Ex parte Palughi* (Ala) 494 So 2d 404.

16. *Hightower & Co. v United States Fidelity & Guaranty Co.* (Ala) 527 So 2d 698; *Power Test Petroleum Distributors, Inc. v Northville Industries Corp.* (2d Dept) 114 App Div 2d 405, 494 NYS2d 129.

Contractor's motion to sever subcontractor's action against contractor for rescission of subcontract from contractor's action against surety on performance bond on subcontract would be denied, in view of fact that there were questions of fact common to both actions, and joint trial was only way complete relief could be granted. *Taylor & Jennings, Inc. v Bellino Bros. Constr. Co.* (3d Dept) 57 App Div 2d 42, 393 NYS2d 203.

17. *Trevino v Lightning Laydown, Inc.* (Tex App Austin) 782 SW2d 946, writ den (May 9, 1990) and reh overr (Jun 27, 1990).

18. *Roberson v Central Fidelity Bank*, 190 Ga App 382, 378 SE2d 698.

- a negligence cause of action and a bad-faith cause of action against the insurance carrier, where joint trial would unnecessarily confuse the jury.¹⁹
- a fraud action and a constructive trust action, when such separate trials will be conducive to expedition and economy.²⁰
- a bad-faith claim by an insured against his insurer and the issue regarding policy coverage, which should be tried first.²¹
- specific performance and the remaining unresolved issues in a summary dispossess proceeding.²²
- an indemnity claim against a third party and the main lawsuit, where the claims are not inseparably intertwined, even though there is some overlap in the proof.²³

On the other hand, separate trial has been properly denied in other cases. Thus, it was held that the court did not abuse its discretion in denying a request that a cause of action for breach of the implied covenant of good faith and fair dealing be tried separately from the issue of liability under a fidelity bond, where the evidence of bad-faith was interrelated with the issue of coverage under the bond.²⁴ And separate trial on property damage and bad-faith claims was not warranted where separation of the bad faith claim would have been appropriate only until the liability issue of the underlying case had been determined, but defendant's liability had already been determined, the property damage issue was not complex, and the danger of prejudice was minimal.²⁵ A trial court was also correct in refusing to order a severance in condemnation case as between the issue of the right to take the property and the value of the land condemned, where there was only one cause of action in controversy.²⁶

F. CRIMINAL CHARGES OR COUNTS [§§ 149-151]

§ 149. Generally

As in the case of civil actions,²⁷ the general rule is that a motion for severance of two or more criminal charges or counts against an accused is not

19. *Kurkierewicz v Loewen* (DC Mont) 109 FRD 601.

20. *Estate of Jones v Kvamme* (Minn App) 430 NW2d 188, *affd in part and revd in part* (Minn) 449 NW2d 428.

21. *Allstate Ins. Co. v Melendez* (Fla App D5) 550 So 2d 156, 14 FLW 2475.

Since recovery on bad faith claim would not have been possible unless insured prevailed on his coverage claim in action against insurer to recover under insurance policies, District Court acted correctly in bifurcating issues to avoid prejudice and to expedite trial. *O'Malley v United States Fidelity & Guaranty Co.* (CA5 Miss) 776 F2d 494.

22. *Fourteen Sharot Place Realty Corp. v Miceli* (2d Dept) 125 App Div 2d 634, 510 NYS2d 168.

23. *Adams v Petrade International, Inc.* (Tex App Houston (1st Dist)) 754 SW2d 696, 7 UCCRS2d 369, *writ den* (Feb 1, 1989) and *writ granted* (Tex) 32 Tex Sup Ct Jour 547, *rehg of writ of error overr* (May 9, 1990) and *cause set for submission* (Oct 11, 1989).

24. *Downey Savings & Loan Assn. v Ohio Casualty Ins. Co.* (2nd Dist) 189 Cal App 3d 1072, 234 Cal Rptr 835, *cert den* 486 US 1036, 100 L Ed 2d 610, 108 S Ct 2023.

25. *Ogden v Montana Power Co.*, 229 Mont 387, 747 P2d 201.

26. *Audish v Clajon Gas Co.* (Tex App Houston (14th Dist)) 731 SW2d 665, 100 OGR 343, *writ ref n re* (Dec 2, 1987).

27. § 120.

a matter of right²⁸ but is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a clear showing of abuse of discretion.²⁹

The key requisite to support a motion for severance of the charges is a showing by the defendant that prejudice will result from trying such charges together.³⁰ Such potential prejudice has been variously described as substantial,³¹ compelling,³² severe,³³ undue,³⁴ and actual or real.³⁵ However, a few

28. State v Goodreau (RI) 560 A2d 318.

A defendant in a criminal case does not have a federal or state constitutional right to be tried on only one offense at a time. *State v Morant* (Mo App) 758 SW2d 110.

29. United States v Pinelli (CA10 Colo) 890 F2d 1461, cert den (US) 108 L Ed 2d 632, 110 S Ct 1498 and cert den (US) 109 L Ed 2d 750, 110 S Ct 2568; United States v Jones (CA8 Mo) 880 F2d 55, 28 Fed Rules Evid Serv 829, reh den (CA8) 1989 US App LEXIS 12123 and reh den (CA8) 1989 US App LEXIS 13053; United States v Cole (ED Pa) 717 F Supp 309; Hopkinson v Shillinger (DC Wyo) 645 F Supp 374, reconsideration den, stay vac (DC Wyo) 648 F Supp 141, affd, in part, remanded (CA10 Wyo) 866 F2d 1185, 27 Fed Rules Evid Serv 919, adhered to, by split decision, on reh, en banc (CA10 Wyo) 888 F2d 1286, cert den (US) 111 L Ed 2d 765, 110 S Ct 3256, habeas corpus proceeding (Wyo) 798 P2d 1186, later proceeding (Wyo) 798 P2d 1192; People v Guffie (Colo App) 749 P2d 976, cert den (Colo) 12 Brief Times Rep 245; State v Herring, 210 Conn 78, 554 A2d 686, cert den 492 US 912, 106 L Ed 2d 579, 109 S Ct 3230; Weddington v State (Del Sup) 545 A2d 607; Murphy v State (Fla App D4) 495 So 2d 1237, 11 FLW 2241; State v Hoffman (App) 116 Idaho 689, 778 P2d 811; People v Stevens (4th Dist) 188 Ill App 3d 865, 136 Ill Dec 433, 544 NE2d 1208; State v Hunter (La App 3d Cir) 551 So 2d 1381; Commonwealth v Vieira, 401 Mass 828, 519 NE2d 1320, companion case 401 Mass 843, 519 NE2d 1328; State v Morant (Mo App) 758 SW2d 110; State v Baker, 237 Mont 140, 773 P2d 1194; State v Pitts, 116 NJ 580, 562 A2d 1320; People v Mercer (4th Dept) 151 App Div 2d 1004, 542 NYS2d 443, app den 74 NY2d 815, 546 NYS2d 572, 545 NE2d 886; State v Chandler, 324 NC 172, 376 SE2d 728; State v Goodreau (RI) 560 A2d 318; State v Haga (Utah) 735 P2d 44, 54 Utah Adv Rep 13; State v Venman, 151 Vt 561, 564 A2d 574; State v Parsons (W Va) 380 SE2d 223.

Generally as to joinder and misjoinder in criminal cases, see 41 Am Jur 2d, Indictments and Informations §§ 209 et seq.

30. Ex parte Hinton (Ala) 548 So 2d 562, cert den (US) 107 L Ed 2d 383, 110 S Ct 419; People v Superior Court (Bresney) (4th Dist) 214 Cal App 3d 1569, 263 Cal Rptr 356, stay

den, review den, op withdrawn by order of ct (Cal) 1989 Cal LEXIS 2308; State v Suggs, 209 Conn 733, 553 A2d 1110; State v Rickerson (La App 3d Cir) 548 So 2d 86; State v Andersen, 232 Neb 187, 440 NW2d 203; State v Pitts, 116 NJ 580, 562 A2d 1320; State v Gallegos (App) 109 NM 55, 781 P2d 783; State v Goodreau (RI) 560 A2d 318; State v Venman, 151 Vt 561, 564 A2d 574; State v Hatfield (W Va) 380 SE2d 670.

The prejudice which a defendant may suffer from a joinder of offenses has been described in the following terms: (1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of defendant in order to find guilt of the other crime or crimes; and (3) defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges. *Wiest v State* (Del Sup) 542 A2d 1193. To the same effect, see *State v Watkins*, 53 Wash App 264, 766 P2d 484.

31. United States v Gorecki (CA3 Pa) 813 F2d 40; United States v Cole (ED Pa) 717 F Supp 309; People v Bean, 46 Cal 3d 919, 251 Cal Rptr 467, 760 P2d 996, reh den (Cal) 1988 Cal LEXIS 337 and stay gr (Cal) 1989 Cal LEXIS 1616 and cert den (US) 108 L Ed 2d 634, 110 S Ct 1499; State v Suggs, 209 Conn 733, 553 A2d 1110; State v Green, 245 Kan 398, 781 P2d 678; State v McFall (Mo App) 737 SW2d 748, post-conviction proceeding (Mo App) 770 SW2d 747; State v Goodreau (RI) 560 A2d 318.

Substantial prejudice is more than disadvantage. *State v Edwards*, 10 Conn App 503, 524 A2d 648, certif den 204 Conn 808, 528 A2d 1155.

32. United States v Ray (MD La) 690 F Supp 508; Ex parte Hinton (Ala) 548 So 2d 562, cert den (US) 107 L Ed 2d 383, 110 S Ct 419.

33. Jones v State, 258 Ga 249, 368 SE2d 313.

34. Elerson v State (Alaska App) 732 P2d 192; State v Thompson, 55 Wash App 888, 781 P2d 501.

35. United States v Jones (CA8 Mo) 880 F2d 55, 28 Fed Rules Evid Serv 829, reh den (CA8)

courts appear to take a very liberal view, holding that a motion for severance should be granted when even arguable prejudice is shown.³⁶ While it has been broadly stated that the court may balance the prejudicial effects of joinder against the benefits of judicial economy realized from a joint trial, and that judicial economy weighs heavily in the balancing process,³⁷ prejudice to defendant caused by failure to sever charges outweighs judicial economy.³⁸ In any event, there is no prejudice to defendant by a single trial of the charges where the evidence is relatively simple and the jury can easily differentiate between the crimes and keep the evidence of each offense separate in its deliberations.³⁹ In this connection, it has been stated that "prejudice" means detriment to one's legal rights or claims.⁴⁰

Practice guide: The movant has the burden of proving that prejudice will result if the severance is not granted.⁴¹ Defendant must show that joinder will result in an unfair trial,⁴² and not merely that defendant might have a better chance of acquittal if the charges are tried separately.⁴³ And general, bare, or unsupported allegations of prejudice will not suffice.⁴⁴

1989 US App LEXIS 12123 and reh den (CA8) 1989 US App LEXIS 13053; *United States v L'Allier* (CA7 Wis) 838 F2d 234, 24 Fed Rules Evid Serv 716; *United States v Cole* (ED Pa) 717 F Supp 309; *Ex parte Hinton* (Ala) 548 So 2d 562, cert den (US) 107 L Ed 2d 383, 110 S Ct 419; *State v Sims* (Mo App) 764 SW2d 692.

There must be actual prejudice to defendant and not just the differences inherent in any trial of different offenses. *People v Guffie* (Colo App) 749 P2d 976, cert den (Colo) 12 Brief Times Rep 245.

36. *State v Linnemeyer*, 86 Or App 22, 738 P2d 586.

37. *State v Baker*, 237 Mont 140, 773 P2d 1194; *State v Slice*, 231 Mont 448, 753 P2d 1309.

In determining whether to sever, the trial court must balance any potential prejudice to defendant against the public's interest in avoiding unnecessary or duplicative trials. *State v Nelson* (App) 146 Wis 2d 442, 432 NW2d 115.

38. *Lee v State* (Fla App D1) 534 So 2d 1226, 13 FLW 2675.

39. *State v Higginbotham* (La App 1st Cir) 554 So 2d 1308; *State v Hunter* (La App 3d Cir) 551 So 2d 1381.

40. *State v Eppinette* (La App 2d Cir) 494 So 2d 1348, further stating that mere inconvenience or loss of strategic advantage caused by a jury trial does not constitute prejudice.

41. *United States v L'Allier* (CA7 Wis) 838 F2d 234, 24 Fed Rules Evid Serv 716; *United States v Disla* (CA9 Cal) 805 F2d 1340; *Hinton v State* (Ala App) 548 So 2d 547, affd, en banc (Ala) 548 So 2d 562, cert den (US) 107 L Ed 2d 383, 110 S Ct 419; *State v Guillen* (App) 151 Ariz 115, 726 P2d 212; *People v Bean*, 46

Cal 3d 919, 251 Cal Rptr 467, 760 P2d 996, reh den (Cal) 1988 Cal LEXIS 337 and stay gr (Cal) 1989 Cal LEXIS 1616 and cert den (US) 108 L Ed 2d 634, 110 S Ct 1499; *State v Edwards*, 10 Conn App 503, 524 A2d 648, certif den 204 Conn 808, 528 A2d 1155; *Wiest v State* (Del Sup) 542 A2d 1193; *State v Thompson* (La App 3d Cir) 544 So 2d 421, cert den (La) 550 So 2d 626; *State v Andersen*, 232 Neb 187, 440 NW2d 203; *State v Sabers* (SD) 442 NW2d 259.

42. *United States v Vastola* (DC NJ) 670 F Supp 1244, later proceeding (DC NJ) 680 F Supp 709, later proceeding (CA3 NJ) 899 F2d 211, 29 Fed Rules Evid Serv 1366, vacated (US) 111 L Ed 2d 744, 110 S Ct 3233, on remand (CA3 NJ) 915 F2d 865, cert den (US) 112 L Ed 2d 1178, 111 S Ct 1073 and (disapproved on other grounds by *United States v Ojeda Rios* (CA2 Conn) 875 F2d 17, cert gr (US) 107 L Ed 2d 183, 110 S Ct 231, motion gr (US) 107 L Ed 2d 534, 110 S Ct 536, vacated (US) 107 L Ed 2d 733, 110 S Ct 713 and vacated (US) 109 L Ed 2d 224, 110 S Ct 1845, later proceeding (CA2 Conn) 922 F2d 934, stay den (US) 113 L Ed 2d 236, 111 S Ct 1304); *State v Baker*, 237 Mont 140, 773 P2d 1194; *Gates v State* (Okla Crim) 754 P2d 882.

43. *United States v L'Allier* (CA7 Wis) 838 F2d 234, 24 Fed Rules Evid Serv 716; *United States v Hernandez* (CA10 Colo) 829 F2d 988, 24 Fed Rules Evid Serv 67, cert den 485 US 1013, 99 L Ed 2d 714, 108 SC 1486, reh den 486 US 1039, 100 L Ed 2d 615, 108 S Ct 2029; *State v Baker*, 237 Mont 140, 773 P2d 1194; *Gates v State* (Okla Crim) 754 P2d 882.

44. *United States v Quintero* (CA5 Tex) 872 F2d 107, 27 Fed Rules Evid Serv 1252 (disagreed with on other grounds by *United States v Taylor* (CA6 Tenn) 882 F2d 1018, mod and

Cautionary instructions to the jury to the effect that each charge or count is to be decided separately or that the evidence should not be considered cumulatively have generally been considered sufficient to prevent prejudice or confusion by the jury where the charges are tried in a single proceeding.⁴⁵

Observation: Severance does not appear to be appropriate when a defendant is charged in alternative counts.⁴⁶

§ 150. Particular cases; grounds

In the vast majority of cases it has been held that defendant was not entitled to a severance of the charges and that the trial court's refusal to grant such severance did not constitute an abuse of its discretion.⁴⁷ Most often, the denial of a severance is based on the grounds that the various charges sought to be

reh den (CA6) 1989 US App LEXIS 19644 and reh den, en banc (CA6) 1989 US App LEXIS 19654 and (disapproved on other grounds by Taylor v United States (US) 109 L Ed 2d 607, 110 S Ct 2143 (not followed by United States v Traxel (CA8 Minn) 914 F2d 119) as stated in United States v Hern (CA8 Ark) 926 F2d 764 and later app (CA8) 1991 US App LEXIS 7935) and cert den (US) 110 L Ed 2d 273, 110 S Ct 2592, reh den (US) 111 L Ed 2d 822, 111 S Ct 6) and cert den (US) 110 L Ed 2d 267, 110 S Ct 2586; United States v McCoy (CA6 Ohio) 848 F2d 743, 25 Fed Rules Evid Serv 1258, postconviction proceeding (CA6) 1991 US App LEXIS 5340; Eatherton v State (Wyo) 761 P2d 91, later app (Wyo) 1991 Wyo LEXIS 49.

45. United States v L'Allier (CA7 Wis) 838 F2d 234, 24 Fed Rules Evid Serv 716; United States v Johnson (CA9 Wash) 820 F2d 1065, 23 Fed Rules Evid Serv 261 (disagreed with on other grounds by Cikora v Dugger (CA11 Fla) 840 F2d 893); United States v Schmude (ED Wis) 699 F Supp 200, affd in part and revd in part (CA7 Wis) 901 F2d 555 (disagreed with by United States v Perez-Magana (CA9 Cal) 91 CDOS 2268, 91 Daily Journal DAR 3696) and (disagreed with by United States v Pedrioli (CA9 Cal) 91 CDOS 2829, 91 Daily Journal DAR 4540); State v Horne, 19 Conn App 111, 562 A2d 43, app gr, in part 213 Conn 807, 568 A2d 793 and revd (on ground that defendant was prejudiced by consolidated prosecution and that curative instruction at conclusion of trial was inadequate to mitigate prejudice) 215 Conn 538, 577 A2d 694; Edwards v State, 258 Ga 12, 364 SE2d 869, substituted op (Ga) 1988 Ga LEXIS 194, withdrawn, reported at (Ga) 1988 Ga LEXIS 1937; Commonwealth v Helfant, 398 Mass 214, 496 NE2d 433; State v Sims (Mo App) 764 SW2d 692; People v Bowman (2d Dept) 155 App Div 2d 606, 547 NYS2d 425, app den 75 NY2d 767, 551 NYS2d 910, 551 NE2d 111; State v Rufener (SD) 392 NW2d 424, adhered to, in part, on reh (SD) 401 NW2d 740; State v York, 50 Wash App 446, 749 P2d 683; State v Nelson (App) 146 Wis 2d 442, 432 NW2d 115.

46. State v Harden (Mo App) 748 SW2d 701.

47. United States v Hogan (CA7 Ill) 886 F2d 1497, 29 Fed Rules Evid Serv 506; United States v Jones (CA8 Mo) 880 F2d 55, 28 Fed Rules Evid Serv 829, reh den (CA8) 1989 US App LEXIS 12123 and reh den (CA8) 1989 US App LEXIS 13053; United States v Palomino (CA10 Utah) 877 F2d 835; United States v Victor Teicher & Co., L.P. (SD NY) 726 F Supp 1424, CCH Fed Secur L Rep ¶94864, later proceeding (SD NY) 1990 US Dist LEXIS 63, later proceeding (SD NY) CCH Fed Secur L Rep ¶94975, later proceeding (SD NY) 1990 US Dist LEXIS 3312, later proceeding (SD NY) 1990 US Dist LEXIS 5131, later proceeding (SD NY) 1990 US Dist LEXIS 6250; Smith v State (Ala App) 551 So 2d 1161, reh den (Ala App) 1989 Ala Crim App LEXIS 854; Collins v State (Alaska App) 778 P2d 1171; Frank v Superior Court, 48 Cal 3d 632, 257 Cal Rptr 550, 770 P2d 1119, reh den; State v Whittingham, 18 Conn App 406, 558 A2d 1009; Sears v State, 259 Ga 671, 386 SE2d 360; People v Stevens (4th Dist) 188 Ill App 3d 865, 136 Ill Dec 433, 544 NE2d 1208; Moore v State (Ind) 545 NE2d 828; State v Barrett (Iowa) 445 NW2d 749; State v Green, 245 Kan 398, 781 P2d 678; State v Higginbotham (La App 1st Cir) 554 So 2d 1308; State v Fournier (Me) 554 A2d 1184; Estes v State (Miss) 533 So 2d 437; State v Moore, 113 NJ 239, 550 A2d 117; People v Jimenez (1st Dept) 157 App Div 2d 575, 550 NYS2d 319; State v Benner, 40 Ohio St 3d 301, 533 NE2d 701, stay den, reh den 41 Ohio St 3d 720, 535 NE2d 315 and cert den (US) 108 L Ed 2d 962, 110 S Ct 1834 and (not followed on other grounds by BPOE Lodge 0170 Gallipolis v Liquor Control Com. (Ohio App, Franklin Co) 1991 Ohio App LEXIS 1093); Middaugh v State (Okla Crim) 767 P2d 432; Commonwealth v Newman, 382 Pa Super 220, 555 A2d 151; State v Olson (SD) 449 NW2d 251; Spain v Commonwealth, 7 Va App 385, 373 SE2d 728; State v Nelson (App) 146 Wis 2d 442, 432 NW2d 115; Dorador v State (Wyo) 768 P2d 1049.

severed are all interrelated in that they show a common scheme or plan,⁴⁸ or involved the same act, conduct, or transaction,⁴⁹ so that the evidence on one charge would be cross-admissible at a separate trial on another charge,⁵⁰ resulting in no significant benefit to defendant in having separate trials.⁵¹

On the other hand, some cases have held that severance of particular charges or counts was proper or within the discretion of the trial court, or that denial of severance constituted reversible error under the circumstances involved,⁵² as where the charges did not arise out of the same acts or

48. *United States v Finley* (ND Ill) 705 F Supp 1272, later proceeding (ND Ill) 708 F Supp 906, later proceeding (ND Ill) 1989 US Dist LEXIS 5219, later proceeding (ND Ill) 1989 US Dist LEXIS 6175; *Burrell v State*, 258 Ga 841, 376 SE2d 184; *State v Hoffman* (App) 116 Idaho 689, 778 P2d 811; *Moore v State* (Ind) 545 NE2d 828; *State v Barrett* (Iowa) 445 NW2d 749; *State v Lakin* (Me) 536 A2d 1124; *People v Greenberg*, 176 Mich App 296, 439 NW2d 336, app den 433 Mich 900; *Estes v State* (Miss) 533 So 2d 437; *State v Antwine* (Mo) 743 SW2d 51, cert den 486 US 1017, 100 L Ed 2d 217, 108 S Ct 1755, post-conviction proceeding (Mo) 791 SW2d 403, cert den (US) 112 L Ed 2d 789, 111 S Ct 769; *State v Chandler*, 324 NC 172, 376 SE2d 728; *State v Hamblin*, 37 Ohio St 3d 153, 524 NE2d 476, reh den 38 Ohio St 3d 711, 533 NE2d 364 and stay gr 38 Ohio St 3d 720, 533 NE2d 1061 and cert den 488 US 975, 102 L Ed 2d 550, 109 S Ct 515, reh den 488 US 1051, 102 L Ed 2d 1008, 109 S Ct 886 and stay den 41 Ohio St 3d 718, 535 NE2d 309 and stay gr 41 Ohio St 3d 722, 535 NE2d 310; *State v Sabers* (SD) 442 NW2d 259; *State v Venman*, 151 Vt 561, 564 A2d 574; *Cook v Commonwealth*, 7 Va App 225, 372 SE2d 780.

49. *State v Whittingham*, 18 Conn App 406, 558 A2d 1009; *Reeves v State*, 258 Ga 619, 373 SE2d 16; *Runyon v State* (Ind) 537 NE2d 475; *Commonwealth v Helfant*, 398 Mass 214, 496 NE2d 433; *State v Davis*, 38 Ohio St 3d 361, 528 NE2d 925, cert den 488 US 1034, 102 L Ed 2d 980, 109 S Ct 849, later app (Ohio App, Butler Co) 1990 Ohio App LEXIS 4717; *Spain v Commonwealth*, 7 Va App 385, 373 SE2d 728; *Eatherton v State* (Wyo) 761 P2d 91, later app (Wyo) 1991 Wyo LEXIS 49.

50. *United States v Jones* (CA8 Mo) 880 F2d 55, 28 Fed Rules Evid Serv 829, reh den (CA8) 1989 US App LEXIS 12123 and reh den (CA8) 1989 US App LEXIS 13053; *United States v Cole* (CA4 Md) 857 F2d 971, cert den 489 US 1070, 103 L Ed 2d 819, 109 S Ct 1351; *United States v L'Allier* (CA7 Wis) 838 F2d 234, 24 Fed Rules Evid Serv 716; *United States v Stackpole* (CA1 Mass) 811 F2d 689, 22 Fed Rules Evid Serv 780; *United States v Chestman* (SD NY) 704 F Supp 451, CCH Fed Secur L Rep ¶ 94175, later proceeding (CA2 NY) 903 F2d 75, CCH Fed Secur L Rep ¶ 95214, recon-

sideration gr, en banc (CA2 NY) CCH Fed Secur L Rep ¶ 95439; *Smith v State* (Ala App) 551 So 2d 1161, reh den (Ala App) 1989 Ala Crim App LEXIS 854; *People v Walker*, 47 Cal 3d 605, 253 Cal Rptr 863, 765 P2d 70, stay gr (Cal) 1989 Cal LEXIS 3886 and reh den, cert den (US) 108 L Ed 2d 635, 110 S Ct 1500 and stay gr (Cal) 1990 Cal LEXIS 4506; *Spivey v State* (Fla App D1) 533 So 2d 306, 13 FLW 2452; *Herring v State*, 191 Ga App 798, 383 SE2d 178; *State v Cirelli* (App) 115 Idaho 732, 769 P2d 609; *People v Callaway* (4th Dist) 185 Ill App 3d 136, 133 Ill Dec 287, 540 NE2d 1153; *State v Lakin* (Me) 536 A2d 1124; *Commonwealth v Anolik*, 27 Mass App 701, 542 NE2d 327, review den 406 Mass 1101, 546 NE2d 375; *State v Holmes* (Mo App) 753 SW2d 104; *State v Slice*, 231 Mont 448, 753 P2d 1309; *Mitchell v State* (Nev) 782 P2d 1340; *State v Dellner*, 130 NH 89, 534 A2d 396; *State v Pitts*, 116 NJ 580, 562 A2d 1320; *State v Chandler*, 324 NC 172, 376 SE2d 728; *State v Benner*, 40 Ohio St 3d 301, 533 NE2d 701, stay den, reh den 41 Ohio St 3d 720, 535 NE2d 315 and cert den (US) 108 L Ed 2d 962, 110 S Ct 1834 and (not followed by BPOE Lodge 0170 Gallipolis v Liquor Control Com. (Ohio App, Franklin Co) 1991 Ohio App LEXIS 1093); *Commonwealth v Lark*, 518 Pa 290, 543 A2d 491; *State v Chenette*, 151 Vt 237, 560 A2d 365.

51. *State v Pollitt*, 205 Conn 61, 530 A2d 155.

A ruling on a motion to sever is based on a weighing of the probative value of any cross-admissible evidence against the prejudicial effect of evidence the jury would not otherwise hear, but in the weighing process the beneficial results of joinder are added to the probative value side. *People v Bean*, 46 Cal 3d 919, 251 Cal Rptr 467, 760 P2d 996, reh den (Cal) 1988 Cal LEXIS 337 and stay gr (Cal) 1989 Cal LEXIS 1616 and cert den (US) 108 L Ed 2d 634, 110 S Ct 1499.

52. *United States v Edwards* (WD Pa) 700 F Supp 837; *United States v Perlmutter* (SD NY) 637 F Supp 1134, later proceeding (SD NY) 656 F Supp 782, affd without op (CA2 NY) 835 F2d 1430, cert den 485 US 935, 99 L Ed 2d 271, 108 S Ct 1110; *Mathis v State* (Alaska App) 778 P2d 1161; *Wiest v State* (Del Sup) 542 A2d 1193; *Hoxter v State* (Fla App D1)

transactions and did not share a common theme,⁵³ or where the evidence would not have been cross-admissible.⁵⁴

■■■ Observation: In a number of cases the defendant has been faced with a very difficult problem in that he wished to testify as to one charge but not as to another. However, most often the trial courts have denied a severance on such grounds.⁵⁵

553 So 2d 785, 15 FLW 23; Commonwealth v Newman, 388 Pa Super 146, 564 A2d 1308, app gr (Pa) 575 A2d 564; State v Dixon (SD) 419 NW2d 699; State v Myers (Tenn Crim) 764 SW2d 214 (disagreed with on other grounds by State v Farmer (Tenn Crim) 1989 Tenn Crim App LEXIS 798) and (disagreed with on other grounds by State v Lewis (Tenn Crim) 803 SW2d 260); State v Watkins, 53 Wash App 264, 766 P2d 484; State v Hatfield (W Va) 380 SE2d 670.

53. United States v Weinberg (ED NY) 656 F Supp 1020; Johnson v State (Alaska App) 730 P2d 175.

Denial of defendant's motion to sever is reversible error where the offenses occurred on different dates, involved different victims, and were not connected as required by court rules. Tyson v State (Fla App D1) 379 So 2d 1321.

A common scheme or plan cannot be inferred merely because defendants are brother and sister. Hayes v State, 182 Ga App 26, 354 SE2d 655.

54. Mathis v State (Alaska App) 778 P2d 1161; People v Superior Court (Duval) (3rd Dist) 198 Cal App 3d 1121, 244 Cal Rptr 522; Commonwealth v Newman, 388 Pa Super 146, 564 A2d 1308, app gr (Pa) 575 A2d 564.

When a trial court considering a defendant's motion for severance of unrelated counts has determined that the evidence of the joint offenses is not cross-admissible, it must then assess the relative strength of the evidence as to each group of severable counts and weigh the potential impact of the jury's consideration of "other crimes" evidence. That is, the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him. People v Bean, 46 Cal 3d 919, 251 Cal Rptr 467, 760 P2d 996, reh den (Cal) 1988 Cal LEXIS 337 and stay gr (Cal) 1989 Cal LEXIS 1616 and cert den (US) 108 L Ed 2d 634, 110 S Ct 1499.

Defendant's motion for severance of offenses was improperly denied where the element that defendant was a convicted felon was necessary to prove the offense of possession of a firearm by a convicted felon but was not necessary and was inadmissible in regard to two other offenses charged.

Orr v State (Fla App D5) 380 So 2d 1185.

55. United States v Quintero (CA5 Tex) 872 F2d 107, 27 Fed Rules Evid Serv 1252 (disagreed with on other grounds by United States v Taylor (CA6 Tenn) 882 F2d 1018, mod and reh den (CA6) 1989 US App LEXIS 19644 and reh den, en banc (CA6) 1989 US App LEXIS 19654 and (disapproved on other grounds by Taylor v United States (US) 109 L Ed 2d 607, 110 S Ct 2143 (not followed on other grounds by United States v Traxel (CA8 Minn) 914 F2d 119) as stated in United States v Hern (CA8 Ark) 926 F2d 764 and later app (CA8) 1991 US App LEXIS 7935) and cert den (US) 110 L Ed 2d 273, 110 S Ct 2592, reh den (US) 111 L Ed 2d 822, 111 S Ct 6) and cert den (US) 110 L Ed 2d 267, 110 S Ct 2586; United States v Hayes (CA10 Colo) 861 F2d 1225, 89-1 USTC ¶ 9203, 27 Fed Rules Evid Serv 55, 63 AFTR 2d 89-306; United States v Possick (CA8 Mo) 849 F2d 332, 26 Fed Rules Evid Serv 88 (disagreed with on other grounds by United States v Moya-Gomez (CA7 Wis) 860 F2d 706 (disagreed with on other grounds by United States v Bissell (CA11 Ga) 866 F2d 1343, reh den, en banc (CA11 Ga) 874 F2d 821 and cert den (US) 107 L Ed 2d 166, 110 S Ct 213 and cert den (US) 107 L Ed 2d 104, 110 S Ct 146) and cert den 492 US 908, 106 L Ed 2d 571, 109 S Ct 3221); United States v Archer (CA7 Wis) 843 F2d 1019, 25 Fed Rules Evid Serv 404, cert den 488 US 837, 102 L Ed 2d 76, 109 S Ct 100; United States v Hernandez (CA10 Colo) 829 F2d 988, 24 Fed Rules Evid Serv 67, cert den 485 US 1013, 99 L Ed 2d 714, 108 SC 1486, reh den 486 US 1039, 100 L Ed 2d 615, 108 S Ct 2029; United States v McDonnell (ND Ill) 699 F Supp 1348, 89-2 USTC ¶ 9443, 63 AFTR 2d 89-1444; Elerson v State (Alaska App) 732 P2d 192; State v Edwards, 10 Conn App 503, 524 A2d 648, certif den 204 Conn 808, 528 A2d 1155; Lyons v United States (Dist Col App) 514 A2d 423; State v McFall (Mo App) 737 SW2d 748, post-conviction proceeding (Mo App) 770 SW2d 747; State v Slice, 231 Mont 448, 753 P2d 1309; People v Corrigan (4th Dept) 139 App Div 2d 918, 527 NYS2d 907, app den 72 NY2d 917, 532 NYS2d 851, 529 NE2d 181; State v Nelson (App) 146 Wis 2d 442, 432 NW2d 115.

The mere fact that a defendant wishes to testify on one count and not on another does not automatically entitle him to a severance;

§ 151. Proceedings; waiver of right

The defendant must make a timely motion for severance of the offenses charged,⁵⁶ and failure to do so results in a waiver of defendant's right to have the offenses tried separately.⁵⁷ A motion for severance after the state's opening statement,⁵⁸ at the conclusion of the government's case-in-chief,⁵⁹ or after the jury's verdict,⁶⁰ is untimely and therefore properly denied.

An oral motion has been held sufficient.⁶¹ It has also been held that defendant's objection to consolidation of all charges based on separate indictments was sufficient to apprise the judge that he did not desire to have the offenses joined in a common trial, so that a severance should have been granted even though no express request for a severance was made, at least where a statute provided for mandatory severance in cases of unlawful consolidation.⁶²

2. RIGHT OF CODEFENDANTS IN CIVIL CASES [§§ 152-156]

§ 152. Generally

As a general rule, one of several defendants properly joined in a civil action is not entitled to demand a separate trial as a matter of right, although in a proper case a court may in the exercise of its discretion grant a severance.⁶³

Statutes and rules of court which authorize severance where two or more parties are joined generally leave the granting of severance to the discretion of the trial court,⁶⁴ but this will not be done where no fair reason exists for the

the defendant must make a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other. *People v Guffie* (Colo App) 749 P2d 976, cert den (Colo) 12 Brief Times Rep 245.

For a case upholding defendant's claim of prejudice in such a situation, see *State v Linemeyer*, 86 Or App 22, 738 P2d 586.

56. *Hodges v State* (Ind) 524 NE2d 774; *State v Long* (Utah) 721 P2d 483, 36 Utah Adv Rep 11.

Forms: Motion for election or separate trial of counts. 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Forms 112, 113.

Order compelling election—Improper joinder of counts. 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Form 118.

57. *Minter v State* (Ala App) 543 So 2d 202; *Fisher v State*, 290 Ark 490, 720 SW2d 900, later proceeding (Ark) LEXIS slip op, post-conviction proceeding (Ark) LEXIS slip op; *Lyons v United States* (Dist Col App) 514 A2d 423; *People v Terry* (4th Dist) 177 Ill App 3d 185, 126 Ill Dec 883, 532 NE2d 568, app den 126 Ill 2d 565, 133 Ill Dec 676, 541 NE2d 1114; *Evans v State* (Ind) 542 NE2d 546; *State v Shubert* (Mo App) 747 SW2d 165; *State v Colvin*, 92 NC App 152, 374 SE2d 126, review den 324 NC 249, 377 SE2d 758 (failure to

renew motion before or at close of all evidence); *State v O'Brien* (Utah) 721 P2d 896, 37 Utah Adv Rep 3.

An untimely motion may be rejected by the court. *State v Wagner* (Iowa) 410 NW2d 207.

58. *King v State*, 300 Ark 3, 775 SW2d 897.

59. *United States v Pinelli* (CA10 Colo) 890 F2d 1461, cert den (US) 108 L Ed 2d 632, 110 S Ct 1498 and cert den (US) 109 L Ed 2d 750, 110 S Ct 2568.

60. *United States v Fagan* (CA5 Tex) 821 F2d 1002, cert den 484 US 1005, 98 L Ed 2d 649, 108 S Ct 697.

61. *Coleman v State* (Tex App Houston (1st Dist)) 735 SW2d 475, petition for discretionary review gr (Oct 5, 1988) and vacated (Tex Crim) 788 SW2d 369.

62. *Ford v State* (Tex App Houston (14th Dist)) 782 SW2d 911.

63. *Miller v American Bonding Co.*, 257 US 304, 66 L Ed 250, 42 S Ct 98; *Way v Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 NW2d 867, 174 ALR 723; *Manley v Paysen*, 215 Iowa 146, 244 NW 863, 84 ALR 1330; *People v Moore*, 306 Mich 29, 10 NW2d 296, cert den 321 US 787, 88 L Ed 1078, 64 S Ct 783, reh den 321 US 804, 88 L Ed 1090, 64 S Ct 846.

64. *Way v Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 NW2d 867, 174 ALR 723; *Manley v*

increased expense, delay, and inconvenience of a separate trial for each defendant.⁶⁵

While the mere fact that a defendant pleads a different defense from that set up by his codefendants does not entitle him to a separate trial,⁶⁶ defendants should be granted separate trials where their interests are hostile, where the action against them is not based on a common legal liability, and where a joint trial would involve the submission of very complex and abstruse questions to the jury, and would materially affect the substantial rights of the parties.⁶⁷ Similarly, severance of trials is properly ordered and not an abuse of discretion in a condemnation action where defendants have divergent interests in that one claims the surface and the other claims the mineral interests in the parcel to be condemned.⁶⁸

Where severance is proper under the circumstances, one defendant may be entitled to it even if the other defendant does not consent thereto.⁶⁹

Labor claimants who are parties to an action on a public contractor's bond are not entitled to separate trials as of right, although in exceptional cases separate trials may be ordered.⁷⁰

§ 153. Under Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure provide that any claim against a party may be severed and proceeded with separately,⁷¹ and that where there has been a permissive joinder of parties, the court may make such order as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials.⁷²

Separate trials of defendants is properly ordered under the Federal Rules where they are unrelated and the claims against them involve different acts,⁷³ as in some patent infringement suits.⁷⁴ And defendants' motion will be granted where separate trials offer a more orderly and efficient way of handling the

Paysen, 215 Iowa 146, 244 NW 863, 84 ALR 1330.

65. *Way v Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 NW2d 867, 174 ALR 723.

66. *Haupt v Simington*, 27 Mont 480, 71 P 672.

As to antagonistic defenses, see § 155.

67. *Way v Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 NW2d 867, 174 ALR 723; *Manley v Paysen*, 215 Iowa 146, 244 NW 863, 84 ALR 1330.

68. *United States v 1071.08 Acres of Land* (CA9 Ariz) 564 F2d 1350, 24 FR Serv 2d 934.

69. *Fowden v Pacific Coast S.S. Co.*, 149 Cal 151, 86 P 178.

70. *Arnold v United States*, 263 US 427, 68 L Ed 371, 44 S Ct 144 (superseded by statute on other grounds as stated in *Re Saco Local Dev. Corp.* (CA1) 711 F2d 441, 10 BCD 1263, 8 CBC2d 1093, 4 EBC 1919, CCH Bankr L Rptr ¶ 69265 (disagreed with on other grounds by

Re Magic Circle Energy Corp. (CA10 Okla) 889 F2d 950 (disagreed with by *Re Johns-Manville Corp.* (CA2 NY) 920 F2d 121, CCH Bankr L Rptr ¶ 73680, later proceeding (BC SD NY) 1990 Bankr LEXIS 2595, reported in full (ED NY) 120 BR 648, 21 BCD 176, later proceeding (ED NY) 122 BR 6)); *Miller v American Bonding Co.*, 257 US 304, 66 L Ed 250, 42 S Ct 98.

Generally, as to actions on bonds of public contractors, see 17 Am Jur 2d, *Contractors' Bonds* §§ 186 et seq. (bonds for state and local projects), 234 et seq. (*Miller Act* payment bonds).

71. FRCP 21.

72. FRCP 20(b).

73. *Cain v New York State Bd. of Elections* (ED NY) 630 F Supp 221.

74. *Graff v Nicholl* (ND Ill) 370 F Supp 974; *Siemens Aktiengesellschaft v Sonotone Corp.* (ND Ill) 370 F Supp 970, 179 USPQ 647, 18 FR Serv 2d 463.

litigation.⁷⁵ Conversely, separate trials are properly refused where the claim asserted against each defendant arose out of the same transaction or occurrence and where there will be common issues of law and fact.⁷⁶ And defendants' motion will be denied where severance or separate trials would result in unwarranted duplication and complications in discovery,⁷⁷ or in possible prejudice to other defendants whose potential liability was factually related to that of the moving defendant.⁷⁸

§ 154. Joint tortfeasors

Whether or not an action against several joint tortfeasors is severable must be determined from the petition and perhaps from the facts and grounds alleged in the motion.⁷⁹ Separate trial is properly refused where it is imperative that the issue of proportionate fault should be litigated between all joint tortfeasors in the same action and resolved by the same trier of the issues of fact.⁸⁰ The mere fact that an employer and employee relationship exists between the person injured or killed by the joint negligence of the employer and a third person does not give rise to a right of severance of the action brought against the joint tortfeasors jointly.⁸¹

§ 155. Antagonistic defenses

The fact that the parties, defendants in a civil case, are antagonistic is immaterial, and confers no rights upon the defendants for severance of the action,⁸² and the fact that the basis or the legal theory of liability against one defendant is different from that against the other defendant is not in itself usually regarded as sufficient ground or circumstance to warrant a request for or grant of severance or separate trial.⁸³ However, the fact that the theory of the action against one of the defendants was gross negligence, whereas that of the action against the other defendant was ordinary negligence, has been regarded as a sufficient circumstance to warrant the request for a severance, or grant of separate trial to one of the defendants, or to constitute its denial an abuse of discretion, on the ground that the jury might be likely to be confused if the two issues were tried together.⁸⁴

75. *Cohen v District of Columbia Nat. Bank* (DC Dist Col) 59 FRD 84, 16 FR Serv 2d 848 (action against banks in which violations of several laws were alleged and issues regarding usury count were separated; defendants' motion under FRCP 20(b) and 42(b) that each defendant bank be given separate trial on usury claims asserted against it was granted).

76. *Condosta v Vermont Electric Cooperative, Inc.* (DC Vt) 400 F Supp 358.

77. *SEC v National Student Marketing Corp.* (DC Dist Col) 360 F Supp 284, CCH Fed Secur L Rep ¶ 93820.

78. *Garber v Randell* (SD NY) 58 FRD 492, CCH Fed Secur L Rep ¶ 93776, 16 FR Serv, 2d 1472, affd (CA2 NY) 477 F2d 711, CCH Fed Secur L Rep ¶ 93931, 17 FR Serv 2d 4.

79. *Way v Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 NW2d 867, 174 ALR 723.

80. *Slusher v Ospital* (Utah) 777 P2d 437, 111 Utah Adv Rep 18.

81. *Way v Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 NW2d 867, 174 ALR 723.

82. *Way v Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 NW2d 867, 174 ALR 723.

As to antagonistic defenses as grounds for severance in criminal cases, see § 170.

83. *Way v Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 NW2d 867, 174 ALR 723.

Forms: Motion for severance of action—By one defendant—Different causes of actions stated against defendants—Adverse interests of defendants. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 42.

84. *Kizer v Hazelett*, 221 Ind 575, 49 NE2d 543.

§ 156. Severance between government and private defendants

In some jurisdictions, the rule is that when a public defendant, such as a county, and a private defendant, such as its insurer, are joined for trial, there is to be one trial with the jury deciding the issues as to the nongovernmental defendant and the judge as to the governmental defendant, and therefore it is proper for the trial court to order a bifurcated trial in such a suit.⁸⁵ A trial court may grant separate trials between an individual defendant and a state defendant in an action for negligence, where a comparative fault statute is expressly made inapplicable to governmental entities.⁸⁶ But severance is mandatory in an action against a governmental entity under the provisions of a state Governmental Tort Liability Act which requires that, where there are multiple defendants and plaintiff is entitled to a jury trial as to one or more of such defendants and not as to others, the court "shall" sever the trial of those defendants for which plaintiff may demand a jury trial from those from which he may not.⁸⁷

Severance may be ordered under FRCP 21 where a claim against the United States is improperly joined with a claim against a private party.⁸⁸

3. SEVERANCE OR SEPARATE TRIALS OF CODEFENDANTS IN CRIMINAL CASES [§§ 157-179]

a. IN GENERAL [§§ 157-163]

§ 157. Generally; preference for joint trial

The general rule is that persons jointly charged with crime should be tried together,⁸⁹ especially where the charges arise out of the same act or transaction⁹⁰ or involve a common scheme⁹¹ or conspiracy,⁹² unless the trial court

85. *Scurria v Madison Parish Police Jury* (La App 2d Cir) 566 So 2d 1077 (holding that statute prohibiting jury trials against state, state agency, or political subdivision does not apply to liability carrier of political subdivision even when it is joined in same action and there exists identity or substantial similarity of issues against both parties).

86. *State v Schuetter* (Ind App) 503 NE2d 418.

87. *Austin v County of Shelby* (Tenn App) 640 SW2d 852, later proceeding (Tenn App) 684 SW2d 624, *affd* in part and *revd* in part (Tenn) 796 SW2d 449, *adhered to*, *reh den* (Tenn) 1990 Tenn LEXIS 320 (holding that "shall" cannot be construed as a discretionary "may").

88. *Lynn v United States* (CA5 Ala) 110 F2d 586.

89. *United States v Lara* (CA8 Minn) 891 F2d 669; *United States v Roberts* (CA4 Va) 881 F2d 95; *United States v Leavitt* (CA11 Fla) 878 F2d 1329, 28 Fed Rules Evid Serv 435, *cert den* (US) 107 L Ed 2d 380, 110 S Ct 415; *United States v Toro* (CA5 Tex) 840 F2d 1221; *United States v Davis* (CA6 Mich) 809 F2d

1194, 22 Fed Rules Evid Serv 567, *cert den* 483 US 1007, 97 L Ed 2d 740, 107 S Ct 3234, post-conviction proceeding (CA6) 1991 US App LEXIS 2259, post-conviction proceeding (CA6) 1991 US App LEXIS 2472; *United States v Polizzi* (CA9 Cal) 801 F2d 1543, 21 Fed Rules Evid Serv 1257; *United States v Gullo* (WD NY) 672 F Supp 99; *People v Johnson* (Ill App 1st Dist) 544 NE2d 392; *State v Bennett* (La App 1st Cir) 517 So 2d 1115, *cert den* (La) 523 So 2d 1335; *People v Stricklin*, 162 Mich App 623, 413 NW2d 457.

Law Reviews: Tanford, *Decision-Making Processes in Joined Criminal Trials*, 12 Crim Just & Beh 367, September, 1985; 9 Law & Hum Behav 319 (December, 1985).

90. *United States v Lara* (CA8 Minn) 891 F2d 669; *United States v Sutton*, 255 App DC 307, 801 F2d 1346, 21 Fed Rules Evid Serv 305; *United States v Akers* (CA9 Or) 542 F2d 770, *cert den* 430 US 908, 51 L Ed 2d 585, 97 S Ct 1181; *United States v Doby* (ND Ind) 665 F Supp 705, later proceeding (ND Ind) 684 F Supp 558, *affd* (CA7 Ind) 872 F2d 779 (disagreed with by multiple cases as stated in *United States v Miller* (CA4 Va) 1991 US App

determines that a defendant may be prejudiced by such joinder.⁹³

§ 158. Power and discretion of court

In the absence of a statute which provides otherwise,⁹⁴ the granting of a severance is not a matter of right,⁹⁵ but rests in the sound discretion of the

LEXIS 3564); *State v Bradley* (La App 4th Cir) 516 So 2d 1337, cert den (La) 521 So 2d 1184; *Tichnell v State*, 287 Md 695, 415 A2d 830, later app 290 Md 43, 427 A2d 991, later app 297 Md 432, 468 A2d 1, cert den 466 US 993, 80 L Ed 2d 846, 104 S Ct 2374, reh den 467 US 1268, 82 L Ed 2d 865, 104 S Ct 3564, later proceeding 306 Md 428, 509 A2d 1179, cert den 479 US 995, 93 L Ed 2d 598, 107 S Ct 598, reh den 479 US 1060, 93 L Ed 2d 992, 107 S Ct 942 and later proceeding 306 Md 692, 511 A2d 461, cert den 480 US 910, 94 L Ed 2d 528, 107 S Ct 1339; *People v Griffin* (2d Dept) 137 App Div 2d 558, 524 NYS2d 298, app den 70 NY2d 1006, 526 NYS2d 941, 521 NE2d 1084; *State v Kite*, 93 NC App 561, 378 SE2d 588, writ den, stay den (NC) 380 SE2d 767 and writ den, app den, review den 324 NC 579, 381 SE2d 778; *Commonwealth v Council*, 355 Pa Super 442, 513 A2d 1003, app den 517 Pa 664, 548 A2d 253.

Annotations: What constitutes "series of acts or transactions" for purposes of Rule 8(b) of Federal Rules of Criminal Procedure, providing for joinder of defendants who are alleged to have participated in same series of acts or transactions, 62 ALR Fed 106.

91. *United States v Lanese* (CA2 Conn) 890 F2d 1284, 29 Fed Rules Evid Serv 446, cert den (US) 109 L Ed 2d 533, 110 S Ct 2207 and on remand (DC Conn) 749 F Supp 53 and (disagreed with on other grounds by *United States v Fells* (CA4 Va) 920 F2d 1179); *United States v Jonas* (CA11 Fla) 786 F2d 1019; *United States v Ramos Alagarin* (CA1 Puerto Rico) 584 F2d 562, 3 Fed Rules Evid Serv 1680; *United States v Beathune* (CA10 Colo) 527 F2d 696, cert den 425 US 996, 48 L Ed 2d 821, 96 S Ct 2211 (defendants were acting together in interstate stolen car ring); *United States v Carrozza* (SD NY) 728 F Supp 266 (holding, however, that there was no common scheme despite some similarities); *United States v Crispen* (ND Ill) 672 F Supp 1100; *Hayes v State*, 182 Ga App 26, 354 SE2d 655.

92. *United States v Sweeney* (CA8 Mo) 817 F2d 1323, 23 Fed Rules Evid Serv 875, cert den 484 US 866, 98 L Ed 2d 141, 108 S Ct 189; *United States v Watkins* (CA11 Fla) 811 F2d 1408, cert den 482 US 909, 96 L Ed 2d 381, 107 S Ct 2490; *United States v Wheeler* (CA5 Miss) 802 F2d 778, cert den 480 US 908, 94 L Ed 2d 524, 107 S Ct 1354; *United States v Spitzer* (CA4) 800 F2d 1267 (disagreed with by multiple cases, as stated in *United States v*

Boylan (CA1 Mass) 898 F2d 230, 29 Fed Rules Evid Serv 1223, cert den (US) 112 L Ed 2d 106, 111 S Ct 139); *United States v Lov-It Creamery, Inc.* (ED Wis) 704 F Supp 1532, mod on other grounds (CA7 Wis) 895 F2d 410; *Crofton v State* (Fla App D1) 491 So 2d 317, 11 FLW 1518; *State v Lowery*, 318 NC 54, 347 SE2d 729; *Commonwealth v Council*, 355 Pa Super 442, 513 A2d 1003, app den 517 Pa 664, 548 A2d 253.

93. *United States v Lara* (CA8 Minn) 891 F2d 669; *United States v Gossett* (CA11 Fla) 877 F2d 901, 28 Fed Rules Evid Serv 826, cert den (US) 107 L Ed 2d 1045, 110 S Ct 1141; *United States v Kragness* (CA8 Minn) 830 F2d 842, 23 Fed Rules Evid Serv 1151 (disagreed with by multiple cases as stated in *United States v Walgren* (CA9 Wash) 885 F2d 1417 (disagreed with by *United States v Craig* (CA7 Ill) 907 F2d 653, 17 FR Serv 3d 431, amd, reh den, en banc (CA7 Ill) 919 F2d 57)); *People v Thomas*, 116 Ill 2d 290, 107 Ill Dec 690, 507 NE2d 843, cert gr 484 US 895, 98 L Ed 2d 186, 108 S Ct 227, motion gr 484 US 1055, 98 L Ed 2d 972, 108 S Ct 1006 and affd 487 US 285, 101 L Ed 2d 261, 108 S Ct 2389.

94. § 159.

95. *State v Douglas*, 10 Conn App 103, 522 A2d 302, different results reached on reh 13 Conn App 685, 539 A2d 155, later app 16 Conn App 206, 546 A2d 971, app den 209 Conn 817, 550 A2d 1086 (no constitutional right); *People v Byron*, 116 Ill 2d 81, 107 Ill Dec 192, 506 NE2d 1247; *Underwood v State* (Ind) 535 NE2d 507, cert den (US) 107 L Ed 2d 206, 110 S Ct 257, reh den (US) 107 L Ed 2d 524, 110 S Ct 524; *McQueen v Commonwealth* (Ky) 721 SW2d 694, cert den 481 US 1059, 95 L Ed 2d 858, 107 S Ct 2203 (no constitutional right); *State v Porter* (La App 3d Cir) 547 So 2d 736; *People v Anderson*, 166 Mich App 455, 421 NW2d 200, app den 432 Mich 858; *State v Ryan*, 233 Neb 74, 444 NW2d 610, later proceeding 233 Neb 151, 444 NW2d 656 and stay gr (US) 58 USLW 3739 and cert den (US) 112 L Ed 2d 176, 111 S Ct 216 (no constitutional right); *Matricia v State* (Okla Crim) 726 P2d 900; *Rajski v State* (Tex App Houston (14th Dist)) 715 SW2d 832 (disapproved on other grounds by *Rutledge v State* (Tex Crim) 749 SW2d 50, motion for rehearing on PDR denied (Apr 27, 1988)); *State v Velarde* (Utah) 734 P2d 440, 47 Utah Adv Rep 3.

court,⁹⁶ as an aspect of its inherent right and duty to manage its own calendar.⁹⁷ The determination of the trial court in this regard will not be reviewed unless an abuse of discretion is shown.⁹⁸

96. *Beazell v Ohio*, 269 US 167, 70 L Ed 216, 46 S Ct 68; *United States v Sobamowo*, 282 App DC 74, 892 F2d 90, cert den (US) 112 L Ed 2d 51, 111 S Ct 78; *United States v Cardall* (CA10 Utah) 885 F2d 656, 28 Fed Rules Evid Serv 1149; *United States v Davis* (CA8 Mo) 882 F2d 1334, cert den (US) 108 L Ed 2d 610, 110 S Ct 1472; *United States v Roberts* (CA4 Va) 881 F2d 95; *United States v Martinez* (CA10 Colo) 877 F2d 1480, cert den (US) 107 L Ed 2d 515, 110 S Ct 513, 110 S Ct 514; *United States v Kragness* (CA8 Minn) 830 F2d 842, 23 Fed Rules Evid Serv 1151 (disagreed with by multiple cases as stated in *United States v Walgren* (CA9 Wash) 885 F2d 1417 (disagreed with by *United States v Craig* (CA7 Ill) 907 F2d 653, 17 FR Serv 3d 431, amd, reh den, en banc (CA7 Ill) 919 F2d 57)); *United States v Connors* (CA9 Wash) 825 F2d 1384, 23 Fed Rules Evid Serv 1115; *United States v Nerse-sian* (CA2 NY) 824 F2d 1294, 23 Fed Rules Evid Serv 487, cert den 484 US 957, 98 L Ed 2d 380, 108 S Ct 355 and cert den 484 US 958, 98 L Ed 2d 382, 108 S Ct 357 and cert den 484 US 1061, 98 L Ed 2d 983, 108 S Ct 1018, habeas corpus proceeding (SD NY) 1990 US Dist LEXIS 12225 and (disagreed with by multiple cases as stated in *United States v Tarantino*, 269 App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174); *United States v Vaccaro* (CA9 Nev) 816 F2d 443, 22 Fed Rules Evid Serv 1570, cert den 484 US 914, 98 L Ed 2d 220, 108 S Ct 262, later proceeding (DC Nev) 1989 US Dist LEXIS 10154, reconsideration den (DC Nev) 719 F Supp 1510, app dismd (CA9 Nev) 91 CDOS 3011, 91 Daily Journal DAR 4863 and cert den 484 US 928, 98 L Ed 2d 255, 108 S Ct 295, habeas corpus proceeding (CA9) 1991 US App LEXIS 7951; *Peek v United States* (CA9 Wash) 321 F2d 934, 5 ALR3d 802, cert den 376 US 954, 11 L Ed 2d 973, 84 S Ct 973; *Butler v United States* (CA8 ND) 317 F2d 249, 6 ALR3d 582, cert den 375 US 836, 11 L Ed 2d 65, 84 S Ct 67 and cert den 375 US 838, 11 L Ed 2d 65, 84 S Ct 77; *United States v Agueci* (CA2 NY) 310 F2d 817, 99 ALR2d 478, cert den 372 US 959, 10 L Ed 2d 11, 83 S Ct 1013, later proceeding (SD NY) 741 F Supp 409, later proceeding (SD NY) 1990 US Dist LEXIS 6362 and cert den 372 US 959, 10 L Ed 2d 12, 83 S Ct 1016; *United States v Cole* (ED Pa) 717 F Supp 309; *United States v Gullo* (WD NY) 672 F Supp 99; *United States v Panzardi-Alvarez* (DC Puerto Rico) 646 F Supp 1158, habeas corpus proceeding (DC Puerto Rico)

678 F Supp 353, affd without op (CA1 Puerto Rico) 873 F2d 1433, post-conviction proceeding (CA1 Puerto Rico) 879 F2d 975, cert den (US) 107 L Ed 2d 1045, 110 S Ct 1140, post-conviction proceeding (CA1) 1991 US App LEXIS 7103; *King v State* (Ala App) 518 So 2d 880; *State v Douglas*, 10 Conn App 103, 522 A2d 302, different results reached on reh 13 Conn App 685, 539 A2d 155, later app 16 Conn App 206, 546 A2d 971, app den 209 Conn 817, 550 A2d 1086; *Bradley v State* (Del Sup) 559 A2d 1234; *Causey v State*, 192 Ga App 294, 384 SE2d 674; *People v Byron*, 116 Ill 2d 81, 107 Ill Dec 192, 506 NE2d 1247; *Parr v State* (Ind) 504 NE2d 1014; *McQueen v Commonwealth* (Ky) 721 SW2d 694, cert den 481 US 1059, 95 L Ed 2d 858, 107 S Ct 2203; *State v Porter* (La App 3d Cir) 547 So 2d 736; *Commonwealth v Vieira*, 401 Mass 828, 519 NE2d 1320, companion case 401 Mass 843, 519 NE2d 1328; *Johnson v State* (Miss) 512 So 2d 1246, cert den 484 US 968, 98 L Ed 2d 402, 108 S Ct 462; *State v Bass*, 221 NJ Super 466, 535 A2d 1; *People v Mahboubian*, 74 NY2d 174, 544 NYS2d 769, 543 NE2d 34; *State v Carson*, 320 NC 328, 357 SE2d 662; *Boyd v State* (Okla Crim) 743 P2d 674; *State v Eddy* (RI) 519 A2d 1137; *State v Weddell* (SD) 410 NW2d 553; *State v Porterfield* (Tenn) 746 SW2d 441, cert den 486 US 1017, 100 L Ed 2d 218, 108 S Ct 1756, post-conviction proceeding (Tenn Crim) 1991 Tenn Crim App LEXIS 106 and post-conviction proceeding, transf (Tenn Crim) 1990 Tenn Crim App LEXIS 372; *State v O'Brien* (Utah) 721 P2d 896, 37 Utah Adv Rep 3; *State v Brown*, 45 Wash App 571, 726 P2d 60.

As to the trial court's discretion to grant severance or separate trials under the Federal Rules of Criminal Procedure, see § 160.

Forms: Severance. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 251, 252.

11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Forms 114 et seq.

97. *United States v Gay* (CA9 Cal) 567 F2d 917, cert den 435 US 999, 56 L Ed 2d 90, 98 S Ct 1655.

98. *United States v Cardall* (CA10 Utah) 885 F2d 656, 28 Fed Rules Evid Serv 1149; *United States v Davis* (CA8 Mo) 882 F2d 1334, cert den (US) 108 L Ed 2d 610, 110 S Ct 1472; *United States v Nerse-sian* (CA2 NY) 824 F2d 1294, 23 Fed Rules Evid Serv 487, cert den 484 US 957, 98 L Ed 2d 380, 108 S Ct 355 and cert den 484 US 958, 98 L Ed 2d 382, 108 S Ct 357 and cert den 484 US 1061, 98 L Ed 2d 983, 108 S Ct 1018, habeas corpus proceeding

However, the trial court has a continuing duty during all stages of the trial to grant a severance if it becomes clear that continued joinder will result in undue prejudice to the defendant.⁹⁹ Furthermore, the court's discretion is judicial,¹ not arbitrary² or absolute,³ and a conviction following a joint trial will be reversed if a miscarriage of justice resulted from the joint trial.⁴

The issue of a severance is to be determined on a case by case basis considering the totality of the circumstances.⁵

§ 159. Statutes and rules of court

The right of a defendant jointly indicted with another, or of the prosecution, to apply for a severance is generally governed by statutes or court rules, many of which merely confirm the common-law rule that defendants jointly prosecuted may be tried separately or jointly in the discretion of the trial court.⁶

■■■■ Observation: Some jurisdictions have a mandatory requirement that all jointly indicted defendants must be tried separately unless otherwise

(SD NY) 1990 US Dist LEXIS 12225 and (disagreed with by multiple cases as stated in *United States v Tarantino*, 269 App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174); *United States v Frazier* (CA4 Md) 394 F2d 258, cert den 393 US 984, 21 L Ed 2d 445, 89 S Ct 457; *Butler v United States* (CA8 ND) 317 F2d 249, 6 ALR3d 582, cert den 375 US 836, 11 L Ed 2d 65, 84 S Ct 67 and cert den 375 US 838, 11 L Ed 2d 65, 84 S Ct 77; *Schaffer v United States* (CA5 Fla) 221 F2d 17, 54 ALR2d 820; *King v State* (Ala App) 518 So 2d 880; *State v Douglas*, 10 Conn App 103, 522 A2d 302, different results reached on reh 13 Conn App 685, 539 A2d 155, later app 16 Conn App 206, 546 A2d 971, app den 209 Conn 817, 550 A2d 1086; *Causey v State*, 192 Ga App 294, 384 SE2d 674; *People v Byron*, 116 Ill 2d 81, 107 Ill Dec 192, 506 NE2d 1247; *State v Porter* (La App 3d Cir) 547 So 2d 736; *State v Finley* (La App 3d Cir) 520 So 2d 1020, cert den (La) 524 So 2d 516; *Commonwealth v Vieira*, 401 Mass 828, 519 NE2d 1320, companion case 401 Mass 843, 519 NE2d 1328; *State v Bass*, 221 NJ Super 466, 535 A2d 1; *People v Bogdanoff*, 254 NY 16, 171 NE 890, 69 ALR 1378; *State v Carson*, 320 NC 328, 357 SE2d 662; *Boyd v State* (Okla Crim) 743 P2d 674; *State v Francis*, 152 SC 17, 149 SE 348, 70 ALR 1133; *State v Weddell* (SD) 410 NW2d 553; *State v Porterfield* (Tenn) 746 SW2d 441, cert den 486 US 1017, 100 L Ed 2d 218, 108 S Ct 1756, post-conviction proceeding (Tenn Crim) 1991 Tenn Crim App LEXIS 106 and post-conviction proceeding, trans (Tenn Crim) 1990 Tenn Crim App LEXIS 372.

99. *United States v Gossett* (CA11 Fla) 877

F2d 901, 28 Fed Rules Evid Serv 826, cert den (US) 107 L Ed 2d 1045, 110 S Ct 1141; *United States v Spitler* (CA4) 800 F2d 1267 (disagreed with by multiple cases as stated in *United States v Boylan* (CA1 Mass) 898 F2d 230, 29 Fed Rules Evid Serv 1223, cert den (US) 112 L Ed 2d 106, 111 S Ct 139); *United States v Cruz* (CA5 Fla) 478 F2d 408, reh den (CA5 Fla) 478 F2d 1403 and cert den 414 US 910, 38 L Ed 2d 148, 94 S Ct 231, 94 S Ct 258, 94 S Ct 259; *United States v Sasso* (SD NY) 78 FRD 292; *Hordge v United States* (Dist Col App) 545 A2d 1249; *State v Weddell* (SD) 410 NW2d 553.

1. *People v Braune*, 363 Ill 551, 2 NE2d 839, 104 ALR 1513.

2. *People v Schmitt* (1st Dist) 173 Ill App 3d 66, 122 Ill Dec 886, 527 NE2d 384, app gr 122 Ill 2d 589, 125 Ill Dec 231, 530 NE2d 259 and revd on other grounds 131 Ill 2d 128, 137 Ill Dec 12, 545 NE2d 665.

3. *People v Smith* (2d Dept) 144 App Div 2d 397, 533 NYS2d 920, app den 73 NY2d 1022, 541 NYS2d 776, 539 NE2d 604; *People v Jones* (1st Dept) 139 App Div 2d 272, 531 NYS2d 906.

4. *United States v Frazier* (CA4 Md) 394 F2d 258, cert den 393 US 984, 21 L Ed 2d 445, 89 S Ct 457; *Schaffer v United States* (CA5 Fla) 221 F2d 17, 54 ALR2d 820.

5. *Lopez v State*, 29 Ark App 145, 778 SW2d 641.

6. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308 (under Rule 14 of the Federal Rules of Criminal Procedure).

As to the interrelationship between Rules 8 and 14 of the FRCrP, see § 160.

ordered by the court,⁷ while other codes state a general preference for joint trials.⁸

The Uniform Rules of Criminal Procedure contain provisions for the severance of defendants upon motion of the prosecuting attorney or a defendant,⁹ or upon the court's own motion.¹⁰

§ 160. —Federal Rules of Criminal Procedure

Although Rule 8(b) of the Federal Rules of Criminal Procedure¹¹ provides that two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same series of acts or transactions constituting an offense or offenses,¹² it also states that such defendants may be charged in one or more counts together or separately, and that all of the defendants need not be charged in each count.¹³ Furthermore, Rule 14 provides that the trial judge may in his discretion furnish relief from prejudicial joinder of defendants in criminal trials by ordering separate trials of counts or granting a severance of defendants.¹⁴

Thus, unlike Rule 8(b), severance motions under Rule 14 are addressed to the discretion of the trial judge and are reviewable only for abuse.¹⁵ In order

7. *State v Coleman*, 45 Ohio St 3d 298, 544 NE2d 622, cert den (US) 107 L Ed 2d 849, 110 S Ct 855, post-conviction proceeding 57 Ohio St 3d 83, 566 NE2d 151.

Under the Arkansas Rules of Criminal Procedure, when a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the prosecutor must elect one of the following courses: a joint trial at which the statement is not admitted into evidence, a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, or severance of the moving defendant. See *Lopez v State*, 29 Ark App 145, 778 SW2d 641.

8. *People v Keenan*, 46 Cal 3d 478, 250 Cal Rptr 550, 758 P2d 1081, cert den 490 US 1012, 104 L Ed 2d 169, 109 S Ct 1656.

9. Unif R Crim P 472.

10. Unif R Crim P 473.

11. FRCrP 8(b).

12. *Schaffer v United States*, 362 US 511, 4 L Ed 2d 921, 80 S Ct 945, reh den 363 US 858, 4 L Ed 2d 1739, 80 S Ct 1605.

Generally, as to joinder of persons in criminal cases, see 41 Am Jur 2d, Indictments and Informations § 210.

Annotations: What constitutes "series of acts or transactions" for purposes of Rule 8(b) of Federal Rules of Criminal Procedure, providing for joinder of defendants who are alleged to have participated in same series of acts or transactions, 62 ALR Fed 106.

13. FRCrP 8(b).

14. FRCrP 14.

15. *United States v Hutchings* (CA8 Mo) 751 F2d 230, 17 Fed Rules Evid Serv 1274, cert den 474 US 829, 88 L Ed 2d 75, 106 S Ct 92, post-conviction proceeding (CA8 Mo) 835 F2d 185; *United States v Welch* (CA5 Tex) 656 F2d 1039, reh den (CA5 Tex) 663 F2d 101 and cert den 456 US 915, 72 L Ed 2d 173, 102 S Ct 1767, 102 S Ct 1768; *United States v Anderson* (CA9 Cal) 642 F2d 281, 7 Fed Rules Evid Serv 1771; *United States v Cleveland* (CA1 Mass) 590 F2d 24, 4 Fed Rules Evid Serv 237; *United States v Tarnowski* (CA6 Mich) 583 F2d 903, cert den 440 US 918, 59 L Ed 2d 468, 99 S Ct 1238; *United States v Michel* (CA5 Tex) 588 F2d 986, cert den 444 US 825, 62 L Ed 2d 32, 100 S Ct 47 and (disagreed with on other grounds by *United States v Covelli* (CA7 Ill) 738 F2d 847, 15 Fed Rules Evid Serv 1688, cert den 469 US 867, 83 L Ed 2d 141, 105 S Ct 211, later proceeding (2d Dist) 184 Ill App 3d 114, 132 Ill Dec 829, 540 NE2d 569, app den (Ill) 136 Ill Dec 594, 545 NE2d 118); *United States v Crawford* (CA5 Miss) 581 F2d 489; *United States v McDonald* (CA9 Ariz) 576 F2d 1350, cert den 439 US 830, 58 L Ed 2d 124, 99 S Ct 105 and cert den 439 US 927, 58 L Ed 2d 320, 99 S Ct 312; *United States v Swanson* (CA5 Ga) 572 F2d 523, cert den 439 US 849, 58 L Ed 2d 152, 99 S Ct 152; *United States v Knowles* (CA10 Wyo) 572 F2d 267; *United States v McClintic* (CA8 Iowa) 570 F2d 685, 2 Fed Rules Evid Serv 903; *United States v Cella* (CA9 Cal) 568 F2d 1266; *United States v Grabiec* (CA7 Ill) 563 F2d 313.

Under Rule 14, weighing of prejudice shown against interests of judicial economy is committed to sound discretion of trial judge. *United States v Wasson* (CA5 Tex) 568 F2d 1214.

to prevail on a claim that the court abused its discretion in denying a motion for severance pursuant to Rule 14, defendant has a heavy burden¹⁶ to show actual,¹⁷ real and compelling prejudice.¹⁸ The test for review of denial of severance under Rule 14 is that defendant must be unable to obtain a fair trial without severance and must demonstrate compelling prejudice against which the trial court will be unable to afford protection.¹⁹ The existence of prejudice under Rule 14 turns upon the facts of each case.²⁰

■■■ Observation: Although Rule 14 can be characterized as the conceptual cousin of Rule 8, the two provisions are admittedly distinct; Rule 14 comes into play only when joinder of defendants already has been deemed proper under Rule 8, but defendants nonetheless argue that such joinder will be prejudicial.²¹ The Supreme Court has stated that the application of the harmless error rule to a misjoinder in violation of Rule 8(b) does not conflict with the applicability of Rule 14, which provides the trial court with discretion to grant a severance when it appears that a defendant or the government is prejudiced by a joinder, since Rule 14 provides the trial court with some flexibility when a joint trial may appear to risk prejudice to a party, while Rule 8(b) requires severance unless its standards are met, even in the absence of prejudice.²²

16. *United States v Pilling* (CA10 Okla) 721 F2d 286, 14 Fed Rules Evid Serv 1162; *United States v Michel* (CA5 Tex) 588 F2d 986, cert den 444 US 825, 62 L Ed 2d 32, 100 S Ct 47 and (disagreed with on other grounds by *United States v Covelli* (CA7 Ill) 738 F2d 847, 15 Fed Rules Evid Serv 1688, cert den 469 US 867, 83 L Ed 2d 141, 105 S Ct 211, later proceeding (2d Dist) 184 Ill App 3d 114, 132 Ill Dec 829, 540 NE2d 569, app den (Ill) 136 Ill Dec 594, 545 NE2d 118); *United States v Smolar* (CA1 Mass) 557 F2d 13, CCH Fed Secur L Rep ¶ 96069, cert den 434 US 866, 54 L Ed 2d 143, 98 S Ct 203 and cert den 434 US 966, 54 L Ed 2d 453, 98 S Ct 508 and cert den 434 US 971, 54 L Ed 2d 461, 98 S Ct 523; *United States v Lov-It Creamery, Inc.* (ED Wis) 704 F Supp 1532, mod on other grounds (CA7 Wis) 895 F2d 410.

17. *United States v Pilling* (CA10 Okla) 721 F2d 286, 14 Fed Rules Evid Serv 1162.

18. *United States v Milham* (CA8 Minn) 590 F2d 717, 3 Fed Rules Evid Serv 894; *United States v Michel* (CA5 Tex) 588 F2d 986, cert den 444 US 825, 62 L Ed 2d 32, 100 S Ct 47 and (disagreed with on other grounds by *United States v Covelli* (CA7 Ill) 738 F2d 847, 15 Fed Rules Evid Serv 1688, cert den 469 US 867, 83 L Ed 2d 141, 105 S Ct 211, later proceeding (2d Dist) 184 Ill App 3d 114, 132 Ill Dec 829, 540 NE2d 569, app den (Ill) 136 Ill Dec 594, 545 NE2d 118); *United States v Becker* (CA5 Tex) 569 F2d 951, reh den (CA5 Tex) 576 F2d 931 and cert den 439 US 865, 58 L Ed 2d 174, 99 S Ct 188 and cert den 439 US 1048, 58 L Ed 2d 708, 99 S Ct 726.

Courts are reluctant to overturn conviction for denial of motion for severance under Rule 14, Fed Rules of Crim Proc, unless there is showing of substantial prejudice. *United States v Stirling* (CA2 NY) 571 F2d 708, CCH Fed Secur L Rep ¶ 96308, 2 Fed Rules Evid Serv 1257, cert den 439 US 824, 58 L Ed 2d 116, 99 S Ct 93.

The burden is upon the moving defendant to show that he would be so prejudiced by a joint trial that in effect he would be denied a constitutionally fair trial. *United States v Wheaton* (SD NY) 463 F Supp 1073, affd without op (CA2 NY) 614 F2d 1293.

19. *United States v Swanson* (CA5 Ga) 572 F2d 523, cert den 439 US 849, 58 L Ed 2d 152, 99 S Ct 152.

20. *United States v Wasson* (CA5 Tex) 568 F2d 1214.

21. *United States v Boffa* (DC Del) 513 F Supp 444.

FRCrP 8(b), governing misjoinder, and FRCrP 14, governing prejudicial joinder, address different concerns: a misjoinder claim questions whether joining together of two or more defendants is proper in first instance, while prejudicial joinder motion assumes that initial joinder was technically proper and argues that joinder of parties and/or offenses was unduly prejudicial. *United States v Bryan* (CA11 Ga) 843 F2d 1339.

22. *United States v Lane*, 474 US 438, 88 L Ed 2d 814, 106 S Ct 725, reh den 475 US 1104, 89 L Ed 2d 907, 106 S Ct 1507 and on remand (CA5 Tex) 788 F2d 309 and (disagreed with on other grounds by multiple cases

§ 161. Requisites; factors considered

Some of the same requisites which limit a trial court's authority to require separate litigation of portions of a civil action²³ also apply in criminal cases involving the issue whether a prosecution against multiple defendants should be severed. The primary requisites are avoidance of prejudice²⁴ and promotion of expeditious or economical adjudication.²⁵ It is frequently stated that the court must balance the potential prejudice to the defendant against the public interest in joint trials.²⁶ It is recognized, however, that inherent in every joint trial is some degree of prejudice and bias, so that only in the event that such prejudice appears to be compelling does severance become warranted.²⁷ Nevertheless, it is also recognized that an accused's fundamental right to a fair

as stated in *United States v Hathaway* (CA6 Mich) 798 F2d 902, 21 Fed Rules Evid Serv 436).

Unlike treatment of error under Rule 8, improper denial of relief under Rule 14 can be harmless error; strict standards for reversible error under Rule 8 are inapplicable to situation where element of Government's case that made joinder proper in first instance is unsupported by evidence, and question becomes whether severance should have been ordered under Rule 14. *United States v Sanders* (CA8 Neb) 563 F2d 379, 2 Fed Rules Evid Serv 497, cert den 434 US 1020, 54 L Ed 2d 767, 98 S Ct 744.

23. §§ 122 et seq.

24. *United States v Lara* (CA8 Minn) 891 F2d 669; *United States v Gossett* (CA11 Fla) 877 F2d 901, 28 Fed Rules Evid Serv 826, cert den (US) 107 L Ed 2d 1045, 110 S Ct 1141; *United States v Kragness* (CA8 Minn) 830 F2d 842, 23 Fed Rules Evid Serv 1151 (disagreed with by multiple cases as stated in *United States v Walgren* (CA9 Wash) 885 F2d 1417 (disagreed with by *United States v Craig* (CA7 Ill) 907 F2d 653, 17 FR Serv 3d 431, amd, reh den, en banc (CA7 Ill) 919 F2d 57)); *People v Thomas*, 116 Ill 2d 290, 107 Ill Dec 690, 507 NE2d 843, cert gr 484 US 895, 98 L Ed 2d 186, 108 S Ct 227, motion gr 484 US 1055, 98 L Ed 2d 972, 108 S Ct 1006 and affd 487 US 285, 101 L Ed 2d 261, 108 S Ct 2389.

25. *United States v Sandini* (CA3 Pa) 888 F2d 300, cert den (US) 108 L Ed 2d 959, 110 S Ct 1831; *United States v Alvarado* (CA2 NY) 882 F2d 645, 28 Fed Rules Evid Serv 721, cert den (US) 107 L Ed 2d 1021, 110 S Ct 1114; *United States v Simon* (CA11 Fla) 839 F2d 1461, 25 Fed Rules Evid Serv 92, cert den 487 US 1223, 101 L Ed 2d 917, 108 S Ct 2883 and cert den 488 US 861, 102 L Ed 2d 129, 109 S Ct 158.

No defendant should ever be deprived of fair trial because it is easier or more economical for Government to try several defendants in one trial rather than in protracted multiple trials, but where there is reasonable assurance that

defendants will be given fair trial regardless of whether severance is granted, judicial economy becomes relevant factor. *United States v Boscia* (CA3 Pa) 573 F2d 827, cert den 436 US 911, 56 L Ed 2d 411, 98 S Ct 2248, reh den 438 US 908, 57 L Ed 2d 1152, 98 S Ct 3130 and cert den 439 US 854, 58 L Ed 2d 160, 99 S Ct 165; *United States v Kozell* (ED Pa) 468 F Supp 746.

26. *United States v Kane* (CA5 Tex) 887 F2d 568, cert den (US) 107 L Ed 2d 1062, 110 S Ct 1159; *United States v Lane* (CA10 Colo) 883 F2d 1484, 51 CCH EPD ¶ 39269, cert den (US) 107 L Ed 2d 956, 110 S Ct 872; *United States v Roper* (CA11 Ala) 874 F2d 782, cert den (US) 107 L Ed 2d 144, 110 S Ct 189 and cert den (US) 107 L Ed 2d 355, 110 S Ct 369; *United States v Cole* (CA4 Md) 857 F2d 971, cert den 489 US 1070, 103 L Ed 2d 819, 109 S Ct 1351; *United States v Zanin* (CA7 Ill) 831 F2d 740; *United States v Butler*, 262 App DC 129, 822 F2d 1191; *United States v Davis* (CA6 Ohio) 707 F2d 880, 13 Fed Rules Evid Serv 121; *Panzavecchia v Wainwright* (CA5 Fla) 658 F2d 337 (disagreed with on other grounds by *Lesko v Owens* (CA3 Pa) 881 F2d 44, 28 Fed Rules Evid Serv 77, cert den (US) 107 L Ed 2d 775, 110 S Ct 759, later app (CA3 Pa) 925 F2d 1527); *United States v Finley* (ND Ill) 705 F Supp 1272, later proceeding (ND Ill) 708 F Supp 906, later proceeding (ND Ill) 1989 US Dist LEXIS 5219, later proceeding (ND Ill) 1989 US Dist LEXIS 6175; *Brown v United States* (Dist Col App) 546 A2d 390; *State v Barrett*, 220 NJ Super 308, 531 A2d 1368, affd in part and revd in part 241 NJ Super 121, 574 A2d 502.

Trial judge has wide discretion whether to sever trial which has been properly joined; in light of government's interest in favor of joint trials, court strikes balance in favor of joinder. *United States v Perry*, 235 App DC 283, 731 F2d 985, 15 Fed Rules Evid Serv 594.

27. *United States v Roper* (CA11 Ala) 874 F2d 782, cert den (US) 107 L Ed 2d 144, 110 S Ct 189 and cert den (US) 107 L Ed 2d 355, 110 S Ct 369.

trial can never be overridden by the convenience and expediency that a joint trial may produce.²⁸

Factors which should be considered by the trial court in exercising its discretion on the question of severance include whether the number of defendants will create confusion²⁹ or pose problems involving length of time involved, courtroom space, and the like;³⁰ whether the jury will be able to separate or "compartmentalize" the evidence against each defendant³¹ or whether there is danger that evidence against one defendant will be considered against another by the jury despite instructions from the court³² (sometimes referred to as the "spillover effect");³³ and whether the defenses of one

28. *Kritzman v State* (Fla) 520 So 2d 568, 13 FLW 157.

29. *Burgan v State*, 258 Ga 512, 371 SE2d 854; *Satterfield v State*, 256 Ga 593, 351 SE2d 625; *Hill v State*, 193 Ga App 401, 387 SE2d 910.

30. *State v Garafola*, 226 NJ Super 657, 545 A2d 257.

31. *United States v Smith* (CA9 Wash) 893 F2d 1573, 30 Fed Rules Evid Serv 142; *United States v Castro* (CA9 Cal) 887 F2d 988, 28 Fed Rules Evid Serv 1479; *United States v Lee* (CA8 Mo) 886 F2d 998, reh den (CA8) 1989 US App LEXIS 16026 and reh den (CA8) 1989 US App LEXIS 16284 and cert den (US) 107 L Ed 2d 765, 110 S Ct 748 and cert den (US) 107 L Ed 2d 768, 110 S Ct 751 and cert den (US) 107 L Ed 2d 770, 110 S Ct 754 and cert den (US) 109 L Ed 2d 290, 110 S Ct 1926; *United States v Wagner* (CA8 Ark) 884 F2d 1090, reh den (CA8) 1989 US App LEXIS 16079 and cert den (US) 108 L Ed 2d 958, 110 S Ct 1829; *United States v Lane* (CA10 Colo) 883 F2d 1484, 51 CCH EPD ¶ 39269, cert den (US) 107 L Ed 2d 956, 110 S Ct 872; *United States v Davis* (CA8 Mo) 882 F2d 1334, cert den (US) 108 L Ed 2d 610, 110 S Ct 1472; *United States v Jones* (CA8 Minn) 875 F2d 674, cert den (US) 107 L Ed 2d 133, 110 S Ct 177; *United States v Roper* (CA11 Ala) 874 F2d 782, cert den (US) 107 L Ed 2d 144, 110 S Ct 189 and cert den (US) 107 L Ed 2d 355, 110 S Ct 369; *United States v Schoenfeld* (CA8 Iowa) 867 F2d 1059; *United States v Cohen* (ED Pa) 444 F Supp 1314.

Ultimate question in ruling on motion for severance under Rule 14 is whether under all circumstances, as practical matter, it is within capacity of jurors to follow court's admonitory instructions and to collate and appraise independent evidence against each defendant solely upon his own acts, statements and conduct. *United States v Gulma* (CA9 Cal) 563 F2d 386.

32. *Satterfield v State*, 256 Ga 593, 351 SE2d 625; *Hill v State*, 193 Ga App 401, 387 SE2d 910.

It is presumed that cautionary instructions to the jury to consider the evidence separate as to each defendant will adequately guard against prejudice. *United States v Leavitt* (CA11 Fla) 878 F2d 1329, 28 Fed Rules Evid Serv 435, cert den (US) 107 L Ed 2d 380, 110 S Ct 415.

33. *United States v Sandini* (CA3 Pa) 888 F2d 300, cert den (US) 108 L Ed 2d 959, 110 S Ct 1831; *United States v Cardall* (CA10 Utah) 885 F2d 656, 28 Fed Rules Evid Serv 1149; *United States v Tutino* (CA2 NY) 883 F2d 1125, 28 Fed Rules Evid Serv 466, cert den (US) 107 L Ed 2d 1044, 110 S Ct 1139; *United States v Davis* (CA8 Mo) 882 F2d 1334, cert den (US) 108 L Ed 2d 610, 110 S Ct 1472; *United States v Lindell* (CA5 Tex) 881 F2d 1313, 28 Fed Rules Evid Serv 1164, reh den (CA5) 1989 US App LEXIS 15201 and cert den (US) 107 L Ed 2d 1056, 110 S Ct 1152 and cert den (US) 110 L Ed 2d 642, 110 S Ct 2621; *United States v Candoli* (CA9 Cal) 870 F2d 496, 27 Fed Rules Evid Serv 1270; *United States v Massey* (CA5 Miss) 827 F2d 995; *United States v Doby* (ND Ind) 665 F Supp 705, later proceeding (ND Ind) 684 F Supp 558, affd (CA7 Ind) 872 F2d 779 (disagreed with by multiple cases as stated in *United States v Miller* (CA4 Va) 1991 US App LEXIS 3564); *United States v Martinez* (SD NY) 634 F Supp 1144; *United States v Aloï* (ED NY) 449 F Supp 698; *State v McFadden* (Iowa App) 443 NW2d 70.

Defendants' convictions should be reversed as to substantive offenses based on prejudicial joinder where although defendants may have been participants in conspiracy, there was too much other evidence offered of entirely separate actions and unconnected defendants, fanning flames of prejudicial spillover, from which trial court failed adequately to protect defendants. *United States v Cambindo Valencia* (CA2 NY) 609 F2d 603, 4 Fed Rules Evid Serv 1197, 5 Fed Rules Evid Serv 570, cert den 446 US 940, 64 L Ed 2d 795, 100 S Ct 2163 and (disagreed with on other grounds by *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988, cert den 489 US 1046, 103 L Ed 2d 244, 109 S Ct 1178).

defendant are antagonistic to the defenses of another.³⁴ Other factors to be considered are the complexity of the case,³⁵ whether one defendant deprived the other of peremptory challenges, whether one defendant feels compelled to testify because the other has chosen to do so, and whether one defendant has a criminal record while the other does not.³⁶

§ 162. Use of multiple juries at joint trials

In the *Bruton* case,³⁷ the Supreme Court ruled that the admission of one defendant's confession at trial violates his codefendant's Sixth Amendment rights of cross-examination when the confessing defendant does not take the stand. Applying this *Bruton* rule, trial courts have generally granted severances under Rule 14, FRCrP, where confessions or other admissions can be admitted against only one defendant. A few courts, however, have experimented with other procedures in an attempt to satisfy *Bruton* while avoiding the time and expense of separate trials for codefendants. Among such procedures are the use of multiple or dual jury trials, in which different juries return verdicts on different defendants and hear only the evidence admissible against the particular defendant whose case they are considering.³⁸

Both federal³⁹ and state⁴⁰ courts have held that the multijury procedure is

34. *Satterfield v State*, 256 Ga 593, 351 SE2d 625; *Hill v State*, 193 Ga App 401, 387 SE2d 910.

Generally, see the discussion in §§ 164 et seq.

35. *United States v Lov-It Creamery, Inc.* (ED Wis) 704 F Supp 1532, mod on other grounds (CA7 Wis) 895 F2d 410.

36. *Ford v State*, 296 Ark 8, 753 SW2d 258.

37. *Bruton v United States*, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, later app (CA8 Mo) 416 F2d 310, 21 ALR Fed 958, cert den 397 US 1014, 25 L Ed 2d 428, 90 S Ct 1248 and (diverged from by *Richardson v Marsh*, 481 US 200, 95 L Ed 2d 176, 107 S Ct 1702, 22 Fed Rules Evid Serv 378, habeas corpus proceeding (CA6 Mich) 873 F2d 129, 13 FR Serv 3d 1463, reh den (CA6) 1989 US App LEXIS 7300 and (disagreed with by *Pontarelli v Stone* (CA1) 1991 US App LEXIS 6728)) as stated in *Tageant v State* (Wyo) 737 P2d 764.

38. ■■■■ *Comment*: The ABA Standards for Criminal Justice state that a joint trial with multiple juries each of which hears only the evidence relevant to its defendant may provide a solution not only to the specific problem of codefendant statements but also to some of the general problems of prejudice that occur in joint trials. ABA Standards for Criminal Justice, Commentary § 13-3.2 at 13-36 (Second Edition 1980).

39. *Smith v De Robertis* (CA7 Ill) 758 F2d 1151, cert den 474 US 838, 88 L Ed 2d 96, 106 S Ct 118; *United States v Lewis*, 230 App DC 212, 716 F2d 16, 72 ALR Fed 863, cert den 464 US 996, 78 L Ed 2d 686, 104 S Ct

492; *United States v Hayes* (CA11 Ala) 676 F2d 1359, reh den (CA11 Ala) 685 F2d 1389 and cert den 459 US 1040, 74 L Ed 2d 608, 103 S Ct 455, later proceeding (Fla App D4) 521 So 2d 215, 13 FLW 486, quashed (Fla) 548 So 2d 209, 14 FLW 392; *United States v Rimar* (CA6 Mich) 558 F2d 1271, cert den 434 US 984, 54 L Ed 2d 478, 98 S Ct 609 and cert den 435 US 922, 55 L Ed 2d 515, 98 S Ct 1484 and cert den 435 US 922, 55 L Ed 2d 515, 98 S Ct 1484.

Convictions for violations of criminal civil rights conspiracy and substantive offense statutes would be affirmed, notwithstanding contentions of two defendants that trial court erred in impaneling two juries, since it was not abuse of discretion to impanel two juries inasmuch as they were at all times kept segregated from each other; resorting to impaneling two juries was way of minimizing prejudice from jointly trying defendants. *United States v Lebron-Gonzalez* (CA1 Puerto Rico) 816 F2d 823, 22 Fed Rules Evid Serv 1483, cert den 484 US 843, 98 L Ed 2d 92, 108 S Ct 135 and cert den 484 US 857, 98 L Ed 2d 120, 108 S Ct 166.

Double jury procedure is to be sustained as long as defendant enjoys rights given by Constitution, Sixth Amendment, and procedural rules. *United States v Gonzalez* (DC Puerto Rico) 610 F Supp 568, later proceeding (DC Puerto Rico) 610 F Supp 574, 19 Fed Rules Evid Serv 124, later proceeding (DC Puerto Rico) 612 F Supp 999, later proceeding (CA1 Puerto Rico) 816 F2d 823, 22 Fed Rules Evid Serv 1483, cert den 484 US 843, 98 L Ed 2d 92, 108 S Ct 135 and cert den 484 US 857, 98 L Ed 2d 120, 108 S Ct 166.

not unconstitutional as against various challenges and have sustained the convictions of criminal defendants who had been tried simultaneously with codefendants before separate juries.⁴¹

However, while at least one court commented that the procedure, although novel, had empirical value and kept the law dynamic,⁴² and another stated that fair new procedures which tend to facilitate proper factfinding are allowable although not traditional,⁴³ some courts, although holding that no prejudice had been shown by defendants, have discouraged the use of the multiple-jury procedure or cautioned against its use except in special circumstances, citing the potential complications and the opportunities for reversible error.⁴⁴

■■■■ **Caution:** A few courts have taken the view that the procedure should be used with caution,⁴⁵ and that it should be the exception rather than the rule,⁴⁶ while some courts have disapproved the practice, notwithstanding various measures taken by the trial courts to safeguard the fairness of the trial process.⁴⁷

Annotations: Propriety of use of multiple juries at joint trial of multiple defendants in federal criminal case, 72 ALR Fed 875.

40. *People v Harris*, 47 Cal 3d 1047, 255 Cal Rptr 352, 767 P2d 619, mod 48 Cal 3d 643a and reh den; *People v Wardlow* (2nd Dist) 118 Cal App 3d 375, 173 Cal Rptr 500; *Feeney v State* (Fla App D1) 359 So 2d 569; *State v Scroggins*, 110 Idaho 380, 716 P2d 1152, cert den 479 US 989, 93 L Ed 2d 585, 107 S Ct 582; *People v Ruiz*, 94 Ill 2d 245, 68 Ill Dec 890, 447 NE2d 148, cert den 462 US 1112, 77 L Ed 2d 1341, 103 S Ct 2465, reh den 463 US 1236, 77 L Ed 2d 1452, 104 S Ct 31, later proceeding 107 Ill 2d 19, 88 Ill Dec 902, 479 NE2d 922, later app 132 Ill 2d 1, 138 Ill Dec 201, 547 NE2d 170, cert den (US) 110 L Ed 2d 652, 110 S Ct 2632; *People v Knight* (1st Dist) 139 Ill App 3d 188, 93 Ill Dec 521, 486 NE2d 1356, cert den 480 US 905, 94 L Ed 2d 518, 107 S Ct 1346; *Board of Trustees v Cogswell*, 205 Kan 847, 473 P2d 1; *People v Kramer*, 103 Mich App 747, 303 NW2d 880; *People v Ricardo B.* (2d Dept) 130 App Div 2d 213, 518 NYS2d 843, affd 73 NY2d 228, 538 NYS2d 796, 535 NE2d 1336.

In *People v Church* (4th Dist) 102 Ill App 3d 155, 57 Ill Dec 679, 429 NE2d 577 and habeas corpus proceeding (CA7 Ill) 771 F2d 1015, the court, while stating that it did not find the multiple-jury procedure particularly attractive, held that it was authorized by statute and was not constitutionally defective.

Annotations: Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 ALR4th 1189.

41. There was no prejudice to objecting defendant from procedure in which his trial was severed from that of other defendant but their two juries heard much of evidence simultane-

ously in one courtroom, with jury for one defendant being removed when evidence was presented that was admissible only against other defendant, where trial court adequately prepared jurors for procedure, where objecting defendant was able to present full defense to his own jury and where, though defendant objected to antagonistic cross-examinations of state witness by opposing defense attorneys, he did not show that jury could have been confused by it and unable to render fair decision. *People v Johnson* (1st Dist) 150 Ill App 3d 1075, 104 Ill Dec 41, 502 NE2d 304, app den (Ill) 106 Ill Dec 52, 505 NE2d 358 and app den 114 Ill 2d 552, 108 Ill Dec 421, 508 NE2d 732 and (disagreed with on other grounds by *People v McEwen* (1st Dist) 157 Ill App 3d 222, 109 Ill Dec 453, 510 NE2d 74, app den 117 Ill 2d 549, 115 Ill Dec 405, 517 NE2d 1091).

42. *Feeney v State* (Fla App D1) 359 So 2d 569.

43. *People v Brooks*, 92 Mich App 393, 285 NW2d 307.

44. *People v Rainge* (1st Dist) 112 Ill App 3d 396, 68 Ill Dec 87, 445 NE2d 535, later proceeding (CA7 Ill) 721 F2d 586, cert den 466 US 909, 80 L Ed 2d 163, 104 S Ct 1690 and cert den 467 US 1219, 81 L Ed 2d 372, 104 S Ct 2667, later app (Ill App 1st Dist) 1991 Ill App LEXIS 358; *State v Watson* (La) 397 So 2d 1337, cert den 454 US 903, 70 L Ed 2d 222, 102 S Ct 410; *State v Corsi*, 86 NJ 172, 430 A2d 210.

45. *State v Corsi*, 86 NJ 172, 430 A2d 210.

46. *People v Ricardo B.*, 73 NY2d 228, 538 NYS2d 796, 535 NE2d 1336.

47. *State v Lambright*, 138 Ariz 63, 673 P2d 1, 41 ALR4th 1165, cert den 469 US 892, 83 L Ed 2d 203, 105 S Ct 267 (the court felt that the use of such an experimental procedure was

§ 163. Practice guide

The trial of one individual jointly with another creates a vast number of problems with which defense counsel must deal. The general inclination of most defense attorneys is to attempt to sever the client's case to uncomplicate matters; yet that inclination may not always be correct. A joint trial offers opportunities unavailable in a single defendant trial. Counsel's decision should involve consideration of at least the following matters:⁴⁸

- Evaluation of parties (Do I want my client tried with this codefendant? Consider the codefendant's personality and background of the codefendant and your client)
- Nature of the case (If your client played only a small role and is named in only one or two counts of a multicount indictment, severance should be sought)
- Evidentiary considerations (If evidence is massive, the jury will have difficulty in considering only that evidence relevant to your client, and if only a small percentage of the evidence is relevant to your defendant, it may prejudice him to have the jury consider his case along with those of defendants against whom there is much more evidence)
- Testimony and admissions of codefendants (If a codefendant intends to take the stand and implicate your client, or if the defenses of codefendants are antagonistic, you should generally seek severance)
- Judicial attitudes (Judges tend to reject defendants' pleas for severance, feeling that their instructions to the jury will succeed in having the jury confine its consideration of evidence to the proper defendant)
- Discovery tactics (If severance is granted, the trial of the first defendant will provide valuable discovery for the defendants subsequently tried, but the potential danger is that a defendant who has previously been convicted may decide to testify for the government to encourage a more lenient sentence)

■■■■ Observation: The mass trial often offers some possibilities not common to the trial of single defendants, including a great deal of publicity which may lead to opportunities for defense funding through donations, and the development of a team defense, particularly in a large conspiracy trial.⁴⁹

b. GROUNDS [§§ 164–175]

(1) IN GENERAL [§§ 164–169]

§ 164. Generally

An order for separate trials of defendants jointly charged must be based upon some legal ground which satisfies the trial court that there should be a

especially inappropriate in a death penalty case); *Scarborough v State*, 50 Md App 276, 437 A2d 672 (expressing grave doubts about the propriety of the multiple-jury procedure).

Law Reviews: Gaynes, *Two Juries/One Trial: Panacea of Judicial Economy or Personification of Murphy's Law*, 5 Am J Trial Advocacy 283

(Fall, 1981).

48. Practice References: Bailey & Rothblatt, *Successful Techniques for Criminal Trials* (2d ed, 1985), §§ 5:3-5:9.

49. Practice References: Bailey & Rothblatt, *Successful Techniques for Criminal Trials* (2d ed, 1985), §§ 5:10-5:12.

departure from regular procedure,⁵⁰ and the mere fact that evidence competent as to one defendant but incompetent as to the other may be introduced is not alone sufficient to establish such prejudice as to require the granting of separate trials.⁵¹ Any set of circumstances which deprives a defendant of a fair trial if tried jointly with another is sufficient to require a separate trial.⁵² It is a ground for severance that the trial has become unmanageable and unfair to the codefendants because defendants are exercising their right to represent themselves,⁵³ or because of the number of counts and defendants.⁵⁴

On the other hand, the mere allegation that defendant would have a better chance of acquittal in a separate trial is insufficient grounds for granting a severance.⁵⁵ Different degrees of notoriety or publicity of the defendants are insufficient grounds for severance.⁵⁶ Similarly, the unsavory reputation of one's codefendant is not, per se, ground for severance of defendants for trial.⁵⁷ And a defendant is not entitled to a severance under FRCrP 14 on the ground that a codefendant jointly indicted with him is identified with an unpopular group.⁵⁸ Disruptive behavior of a codefendant in the courtroom does not

50. *People v Friday*, 18 Cal App 2d 197, 63 P2d 303.

Practice References: Motion for severance—Grounds for severance. 5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases § 54.

51. *Hoskins v Commonwealth* (Ky) 374 SW2d 839.

52. *Schaffer v United States*, 362 US 511, 4 L Ed 2d 921, 80 S Ct 945, reh den 363 US 858, 4 L Ed 2d 1739, 80 S Ct 1605; *Barton v United States* (CA5 Tex) 263 F2d 894; *People v Braune*, 363 Ill 551, 2 NE2d 839, 104 ALR 1513.

53. *United States v Dougherty*, 154 App DC 76, 473 F2d 1113.

54. *United States v Vastola* (DC NJ) 670 F Supp 1244, later proceeding (DC NJ) 680 F Supp 709, later proceeding (CA3 NJ) 899 F2d 211, 29 Fed Rules Evid Serv 1366, vacated (US) 111 L Ed 2d 744, 110 S Ct 3233, on remand (CA3 NJ) 915 F2d 865, cert den (US) 112 L Ed 2d 1178, 111 S Ct 1073.

55. *United States v Cardall* (CA10 Utah) 885 F2d 656, 28 Fed Rules Evid Serv 1149; *United States v Roberts* (CA4 Va) 881 F2d 95; *United States v Novak* (CA7 Wis) 870 F2d 1345; *United States v Sherlock* (CA9 Ariz) 865 F2d 1069; *United States v Nerlinger* (CA2 NY) 862 F2d 967, 27 Fed Rules Evid Serv 271; *United States v Moya-Gomez* (CA7 Wis) 860 F2d 706 (disagreed with on other grounds by *United States v Bissell* (CA11 Ga) 866 F2d 1343, reh den, en banc (CA11 Ga) 874 F2d 821 and cert den (US) 107 L Ed 2d 166, 110 S Ct 213 and cert den (US) 107 L Ed 2d 104, 110 S Ct 146) and cert den 492 US 908, 106 L Ed 2d 571, 109 S Ct 3221; *United States v Dickey* (CA10 Okla) 736 F2d 571, 15 Fed Rules Evid Serv 1613, cert den 469 US 1188, 83 L Ed 2d 964,

105 S Ct 957; *United States v Perry*, 235 App DC 283, 731 F2d 985, 15 Fed Rules Evid Serv 594; *United States v Knowles* (CA10 Wyo) 572 F2d 267; *United States v Dynalectric Co.* (WD Ky) 674 F Supp 240, 1988-2 CCH Trade Cases ¶ 68238; *United States v Turoff* (ED NY) 652 F Supp 707, motion den (ED NY) 691 F Supp 607, later proceeding (CA2 NY) 853 F2d 1037, 88-2 USTC ¶ 9526, 26 Fed Rules Evid Serv 435, 62 AFTR 2d 88-5236; *United States v Stone* (ED Wis) 444 F Supp 1254, affd without op (CA7 Wis) 588 F2d 834; *Bradley v State* (Del Sup) 559 A2d 1234; *State v Brown*, 219 NJ Super 412, 530 A2d 402, later proceeding 228 NJ Super 211, 549 A2d 462, app gr 114 NJ 497, 555 A2d 618 and revd 118 NJ 595, 573 A2d 886; *Commonwealth v Patterson*, 519 Pa 190, 546 A2d 596.

56. *United States v Garcia* (CA2 NY) 848 F2d 1324, 25 Fed Rules Evid Serv 1419, motion gr, cert gr 488 US 1003, 102 L Ed 2d 773, 109 S Ct 782 and cert den 489 US 1070, 103 L Ed 2d 820, 109 S Ct 1352 and revd 490 US 858, 104 L Ed 2d 923, 109 S Ct 2237 and vacated 491 US 902, 105 L Ed 2d 690, 109 S Ct 3181; *United States v Brighton Bldg. & Maintenance Co.* (ND Ill) 435 F Supp 222, 1977-2 CCH Trade Cases ¶ 61764, affd (CA7 Ill) 598 F2d 1101, 1979-1 CCH Trade Cases ¶ 62637, 4 Fed Rules Evid Serv 769, cert den 444 US 840, 62 L Ed 2d 52, 100 S Ct 79, 100 S Ct 80 (some defendants received mention in press); *United States v Mandel* (DC Md) 415 F Supp 1033 (extensive pretrial publicity generated because governor of state was codefendant).

57. *United States v Knowles* (CA10 Wyo) 572 F2d 267; *United States v Myers* (CA4 Va) 406 F2d 746.

58. *United States v Dickens* (CA3 NJ) 695 F2d 765, cert den 460 US 1092, 76 L Ed 2d 359,

require severance.⁵⁹ Nor is a defendant necessarily entitled to a separate trial merely because his codefendants are charged as habitual criminals.⁶⁰

Defendant's decision to proceed pro se does not entitle codefendants to severance in the absence of a specific showing of prejudice.⁶¹

§ 165. Disparity in weight of evidence

Differences in the amount of proof are inevitable in multi-defendant trials,⁶² and there is no requirement in joint trials that the evidence of each defendant's culpability be quantitatively or qualitatively equivalent.⁶³ Accordingly, it is generally held that a disparity in the weight of the evidence against the various defendants is insufficient to justify severance.⁶⁴ Thus, a defendant is

103 S Ct 1792 and cert den 461 US 909, 76 L Ed 2d 812, 103 S Ct 1883; *United States v Jackson* (CA8 Mo) 549 F2d 517, 1 Fed Rules Evid Serv 633, 40 ALR Fed 907, cert den 430 US 985, 52 L Ed 2d 379, 97 S Ct 1682 and cert den 431 US 923, 53 L Ed 2d 236, 97 S Ct 2195 and cert den 431 US 968, 53 L Ed 2d 1064, 97 S Ct 2928; *United States v De Larosa* (CA3 Pa) 450 F2d 1057, cert den 405 US 927, 30 L Ed 2d 800, 92 S Ct 978 and cert den 405 US 957, 31 L Ed 2d 235, 92 S Ct 1188 and cert den 405 US 957, 31 L Ed 2d 236, 92 S Ct 1189.

Annotations: Defendant's right, under Rule 14, Federal Rules of Criminal Procedure, to severance in federal criminal trial because of codefendant's identification with an unpopular group, 40 ALR Fed 937.

59. *United States v Smith* (CA8 Neb) 578 F2d 1227, later app (CA8 Neb) 600 F2d 149; *United States v Bentvena* (CA2 NY) 319 F2d 916, cert den 375 US 940, 11 L Ed 2d 271, 84 S Ct 345, reh den 397 US 928, 25 L Ed 2d 108, 90 S Ct 894 and cert den 375 US 940, 11 L Ed 2d 271, 84 S Ct 345 and cert den 375 US 940, 11 L Ed 2d 271, 84 S Ct 345, reh den 375 US 989, 11 L Ed 2d 476, 84 S Ct 515 and cert den 375 US 940, 11 L Ed 2d 271, 84 S Ct 345 and cert den 375 US 940, 11 L Ed 2d 271, 84 S Ct 346, reh den 377 US 913, 12 L Ed 2d 183, 84 S Ct 1162 and cert den 375 US 940, 11 L Ed 2d 272, 84 S Ct 353 and cert den 375 US 940, 11 L Ed 2d 272, 84 S Ct 354 and cert den 375 US 940, 11 L Ed 2d 272, 84 S Ct 355 and cert den 375 US 940, 11 L Ed 2d 272, 84 S Ct 360; *Rhoden v Israel* (ED Wis) 574 F Supp 61, 15 Fed Rules Evid Serv 679; *State v McGuire*, 297 NC 69, 254 SE2d 165, cert den 444 US 943, 62 L Ed 2d 310, 100 S Ct 300.

But where codefendant created prolonged and disruptive disturbances of the trial and the judge took no steps to control his behavior, so that the jury was exposed to many distracting influences, defendant who had been denied a severance and mistrial because of such activities, did not receive a fair trial. *Aratari v Cardwell* (SD Ohio) 357 F Supp 681, 33 Ohio Misc 202, 62 Ohio Ops 2d 363.

60. *People v Kozlowski*, 368 Ill 124, 13 NE2d 174, 115 ALR 1505.

61. *United States v Oglesby* (CA7 Ill) 764 F2d 1273.

62. *United States v Tutino* (CA2 NY) 883 F2d 1125, 28 Fed Rules Evid Serv 466, cert den (US) 107 L Ed 2d 1044, 110 S Ct 1139; *United States v Rastelli* (ED NY) 653 F Supp 1034.

63. *United States v Jones* (CA8 Mo) 880 F2d 55, 28 Fed Rules Evid Serv 829, reh den (CA8) 1989 US App LEXIS 12123 and reh den (CA8) 1989 US App LEXIS 13053.

64. *United States v Sababu* (CA7 Ill) 891 F2d 1308, 29 Fed Rules Evid Serv 332; *United States v Davis* (CA8 Mo) 882 F2d 1334, cert den (US) 108 L Ed 2d 610, 110 S Ct 1472; *United States v Martin* (CA8 Minn) 866 F2d 972, 27 Fed Rules Evid Serv 618; *United States v Silvestri* (CA1 Mass) 790 F2d 186, 20 Fed Rules Evid Serv 999, cert den 479 US 857, 93 L Ed 2d 129, 107 S Ct 197; *United States v Harrelson* (CA5 Tex) 754 F2d 1153, 17 Fed Rules Evid Serv 738, later proceeding (CA5 Tex) 754 F2d 1186, 17 Fed Rules Evid Serv 747, reh den, en banc (CA5 Tex) 765 F2d 1120 and cert den 474 US 922, 88 L Ed 2d 262, 106 S Ct 255 and reh den, en banc (CA5 Tex) 766 F2d 186 and cert den 474 US 908, 88 L Ed 2d 241, 106 S Ct 277 and cert den 474 US 1034, 88 L Ed 2d 578, 106 S Ct 599, later proceeding (WD Tex) 638 F Supp 1389, later app (CA5 Tex) 807 F2d 398, cert den 484 US 832, 98 L Ed 2d 66, 108 S Ct 106; *United States v Bruner*, 212 App DC 36, 657 F2d 1278, 8 Fed Rules Evid Serv 1573; *United States v Grabiec* (CA7 Ill) 563 F2d 313; *United States v Cole* (ND Ill) 707 F Supp 999, later proceeding (ND Ill) 726 F Supp 726; *Garris v United States* (Dist Col App) 559 A2d 323; *State v Burton* (Tenn Crim) 751 SW2d 440; *Pike v State* (Tex App Waco) 758 SW2d 357, petition for discretionary review ref (May 24, 1989) and vacated, en banc (Tex Crim) 772 SW2d 130, on remand (Tex App Waco) 788 SW2d 43, petition for discretionary review ref (May 23, 1990).

not entitled to severance merely because the evidence against the codefendant is more damaging than that against him,⁶⁵ or even that the quantity of evidence against him is de minimis in relation to the evidence against the codefendant.⁶⁶ Thus, severance is an appropriate remedy for disparity in evidence only in the most extreme cases.⁶⁷

§ 166. Prejudicial evidence against codefendant

In a few cases it has been held that the court may grant a separate trial where it appears that a defendant would be prejudiced on a joint trial by the reception of evidence incompetent against him but competent as against a codefendant, although a refusal may be justified where prejudice from the evidence can be avoided by an instruction limiting its effect.⁶⁸ Far more often, however, it has been held that defendant is not entitled to severance merely because certain evidence may be admissible only against others.⁶⁹ Nor are

Quantitative and qualitative differences between the evidence implicating defendant and a coconspirator are not alone sufficient to justify severance. *United States v Valdez* (CA5 La) 861 F2d 427, 27 Fed Rules Evid Serv 242, reh den, en banc (CA5 La) 864 F2d 791 and cert den 489 US 1083, 103 L Ed 2d 844, 109 S Ct 1539; *Sweet v United States* (Dist Col App) 438 A2d 447.

See *United States v Moya-Gomez* (CA7 Wis) 860 F2d 706 (disagreed with on other grounds by *United States v Bissell* (CA11 Ga) 866 F2d 1343, reh den, en banc (CA11 Ga) 874 F2d 821 and cert den (US) 107 L Ed 2d 166, 110 S Ct 213 and cert den (US) 107 L Ed 2d 104, 110 S Ct 146) and cert den 492 US 908, 106 L Ed 2d 571, 109 S Ct 3221, stating that denial of motion for severance may be abuse of discretion if there is great disparity of evidence between moving defendant and his co-defendant, but holding that in instant case, where trial court instructed jury at several stages that it was to consider each defendant separately, and evidence was sufficient to support defendant's conviction, defendant could demonstrate no actual prejudice from joint trial.

65. *United States v Fuel* (CA8 Mo) 583 F2d 978, 3 Fed Rules Evid Serv 976, cert den 439 US 1127, 59 L Ed 2d 88, 99 S Ct 1044; *United States v Smolar* (CA1 Mass) 557 F2d 13, CCH Fed Secur L Rep ¶96069, cert den 434 US 866, 54 L Ed 2d 143, 98 S Ct 203 and cert den 434 US 966, 54 L Ed 2d 453, 98 S Ct 508 and cert den 434 US 971, 54 L Ed 2d 461, 98 S Ct 523; *United States v Dansker* (CA3 NJ) 537 F2d 40, 2 Fed Rules Evid Serv 577, cert den 429 US 1038, 50 L Ed 2d 748, 97 S Ct 732 and later app (CA3 NJ) 561 F2d 485 and later app (CA3 NJ) 565 F2d 1262, cert dismd 434 US 1052, 54 L Ed 2d 805, 98 S Ct 905; *United States v Snead* (ED Pa) 447 F Supp 1321, 3 Fed Rules Evid Serv 159, affd without op (CA3 Pa) 577 F2d 730, cert den 436 US 930, 56 L Ed 2d 775, 98 S Ct 2829 and cert den 439 US

851, 58 L Ed 2d 154, 99 S Ct 156 and cert den 441 US 909, 60 L Ed 2d 379, 99 S Ct 2003; *United States v Mearns* (DC Del) 443 F Supp 1244; *United States v Slawik* (DC Del) 408 F Supp 190, affd without op (CA3 Del) 564 F2d 90 and affd without op (CA3 Del) 564 F2d 90.

66. *United States v Bolts* (CA5 Tex) 558 F2d 316, cert den 434 US 930, 54 L Ed 2d 290, 98 S Ct 417 and cert den 439 US 898, 58 L Ed 2d 246, 99 S Ct 262.

Trial court did not err in denying defendant's motion to sever burglary indictment from four others where there was some evidence, even though slight and circumstantial, connecting defendant to continuing conspiracy involving that burglary and subsequent burglary and murder charged in other indictments. *Gaddis v State*, 239 Ga 238, 236 SE2d 594, cert den 434 US 1088, 55 L Ed 2d 794, 98 S Ct 1285, reh den 435 US 981, 56 L Ed 2d 75, 98 S Ct 1634, later proceeding 245 Ga 200, 265 SE2d 275, habeas corpus proceeding 247 Ga 717, 279 SE2d 219, cert den 454 US 1037, 70 L Ed 2d 483, 102 S Ct 579, habeas corpus proceeding (SD Ga) 638 F Supp 819.

67. *United States v Scott* (CA5 La) 795 F2d 1245, 21 Fed Rules Evid Serv 543.

68. *State v Turnbow*, 67 NM 241, 354 P2d 533, 89 ALR2d 461.

69. *United States v Chang An-Lo* (CA2 NY) 851 F2d 547, 26 Fed Rules Evid Serv 14, cert den 488 US 966, 102 L Ed 2d 530, 109 S Ct 493; *United States v Panza* (CA2 NY) 750 F2d 1141, 17 Fed Rules Evid Serv 339; *United States v Oxford* (CA7 Ill) 735 F2d 276; *United States v Arruda* (CA1 Mass) 715 F2d 671, 13 Fed Rules Evid Serv 1979; *United States v Persico* (SD NY) 621 F Supp 842, later proceeding (CA2 NY) 802 F2d 444, later op (CA2 NY) 804 F2d 185, later proceeding (SD NY) 646 F Supp 752, affd in part and revd in part (CA2 NY) 832 F2d 705, 24 Fed Rules Evid Serv 137, 89 ALR Fed 857, cert den 486 US

defendants entitled to severance and separate trials from others where, with regard to evidence that was inadmissible against them, the court gives the jury cautionary or limiting instructions regarding separate consideration to be given to each defendant.⁷⁰

§ 167. Where codefendant has incriminated himself

It is within the sound discretion of the trial court whether defendants jointly charged with the commission of a crime shall be tried jointly or separately where a codefendant has made a confession, admission, or other extrajudicial self-incriminating statement, implicating the movant in the commission of the crime.⁷¹ However, there is authority to the effect that where a confession by one of several defendants tends to implicate others, a severance should be ordered unless the prosecutor declares or stipulates that it will not be offered

1022, 100 L Ed 2d 227, 108 S Ct 1995, 108 S Ct 1996, later proceeding (CA2 NY) 861 F2d 339, 26 Fed Rules Evid Serv 1499, cert den 490 US 1022, 104 L Ed 2d 186, 109 S Ct 1750 and cert den 490 US 1048, 104 L Ed 2d 426, 109 S Ct 1957, habeas corpus proceeding (SD NY) 1990 US Dist LEXIS 11899 and post-conviction proceeding (SD NY) 1989 US Dist LEXIS 3774, later proceeding (SD NY) 1989 US Dist LEXIS 11039, post-conviction proceeding (SD NY) 1990 US Dist LEXIS 66, later proceeding (SD NY) 1990 US Dist LEXIS 2480, post-conviction proceeding (SD NY) 1990 US Dist LEXIS 4711, later proceeding (SD NY) 1991 US Dist LEXIS 130, later proceeding (SD NY) 1991 US Dist LEXIS 1547 and cert den 488 US 982, 102 L Ed 2d 564, 109 S Ct 532; *United States v Rucker* (CA2 NY) 586 F2d 899, 3 Fed Rules Evid Serv 1356; *State v Nelson*, 298 NC 573, 260 SE2d 629, cert den 446 US 929, 64 L Ed 2d 282, 100 S Ct 1867.

Although every bit of evidence that was admissible in defendants' joint trial might not be admissible against codefendant in separate trials of charges, severance is not warranted where court perceives no particular danger that jury would cumulate such evidence against either defendant. *United States v Carmichael* (CA4 SC) 685 F2d 903, 11 Fed Rules Evid Serv 409, cert den 459 US 1202, 75 L Ed 2d 434, 103 S Ct 1187, later app (CA4 SC) 726 F2d 158.

70. *United States v Swift* (CA6 Mich) 809 F2d 320, 22 Fed Rules Evid Serv 571; *United States v Lochan* (CA1 Me) 674 F2d 960; *United States v Peterson* (CA4 Va) 524 F2d 167, cert den 423 US 1088, 47 L Ed 2d 99, 96 S Ct 881 and cert den 424 US 925, 47 L Ed 2d 334, 96 S Ct 1136; *State v Rinck*, 303 NC 551, 280 SE2d 912.

Even though there will be evidence that will be admissible against one defendant charged with conspiracy, but not both, severance is not required in absence of showing that normal limiting instruction to jury will be ineffectual to

prevent jury from considering such evidence as evidence against both defendants. *United States v Cova* (ED Mo) 585 F Supp 1187.

71. *Delli Paoli v United States*, 352 US 232, 1 L Ed 2d 278, 77 S Ct 294, 57-1 USTC ¶9356, 51 AFTR 1 (ovrld on other grounds by *Bruton v United States*, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, later app (CA8 Mo) 416 F2d 310, 21 ALR Fed 958, cert den 397 US 1014, 25 L Ed 2d 428, 90 S Ct 1248); *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308; *United States v Knife* (CA8 SD) 592 F2d 472, 4 Fed Rules Evid Serv 284; *Peek v United States* (CA9 Wash) 321 F2d 934, 5 ALR3d 802, cert den 376 US 954, 11 L Ed 2d 973, 84 S Ct 973 and (disagreed with on other grounds by *United States v Tsinnijinnie* (CA9 Ariz) 601 F2d 1035, cert den 445 US 966, 64 L Ed 2d 242, 100 S Ct 1657); *Forehand v Fogg* (SD NY) 500 F Supp 851; *Walton v State*, 159 Ga App 331, 283 SE2d 366; *Henry v State*, 269 Ind 1, 379 NE2d 132; *State v Mack*, 243 La 369, 144 So 2d 363, cert den 373 US 917, 10 L Ed 2d 416, 83 S Ct 1306; *State v Smith* (Me) 415 A2d 553; *State v Jackson*, 43 NJ 148, 203 A2d 1, 11 ALR3d 841, cert den 379 US 982, 13 L Ed 2d 572, 85 S Ct 690; *People v Player*, 80 Misc 2d 177, 362 NYS2d 773; *Cooks v State* (Okla Crim) 699 P2d 653, cert den 474 US 935, 88 L Ed 2d 275, 106 S Ct 268; *White v State* (Tenn Crim) 497 SW2d 751.

The trial court does not commit reversible error where the codefendant's statements were not facially incriminating as to the defendant and were accompanied by appropriate limiting instructions. *United States v Smith* (CA2 NY) 918 F2d 1032, cert den (US) 112 L Ed 2d 1191, 111 S Ct 1086.

Annotations: Right to severance where codefendant has incriminated himself, 54 ALR2d 830 §§ 3, 4.

Practice References: Motion for severance. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 57.

in evidence on the trial,⁷² or that such confession will not be offered to the jury without appropriate instructions,⁷³ unless the confession should be admissible against such others.⁷⁴

It is an abuse of discretion to deny separate trials where an instruction cannot remove the prejudicial effect on the defendants implicated.⁷⁵ However, where the evidence of guilt is strong, the fact that damaging admissions by a codefendant were introduced in evidence does not in and of itself indicate an abuse of discretion in denying separate trials despite the limiting instructions.⁷⁶

Among additional factors which have been articulated, and which have affected the results in a number of cases, are the following: the weight and

72. *United States v Boomer* (CA10 Kan) 571 F2d 543, cert den 436 US 911, 56 L Ed 2d 411, 98 S Ct 2250; *United States v Armco Steel Corp.* (WD Mo) 438 F Supp 847; *Dorsey v State*, 236 Ga 591, 225 SE2d 418; *People v Clark*, 17 Ill 2d 486, 162 NE2d 413; *People v Baer* (1st Dist) 35 Ill App 3d 391, 342 NE2d 177 (disagreed with on other grounds by *People v Wolski* (2d Dist) 83 Ill App 3d 17, 38 Ill Dec 297, 403 NE2d 528, cert den 450 US 915, 67 L Ed 2d 339, 101 S Ct 1356); *State v Monk* (La) 315 So 2d 727.

But, in prosecution for violation of bank laws in which all defendants but one had signed agreement that appeared to concede charges in indictment, nonsigning defendant was entitled to separate trial notwithstanding prosecution argument that agreement did not clearly inculcate defendant and that prosecution did not intend to rely primarily upon the agreement. *United States v Corgiat* (ND Ill) 431 F Supp 45.

Annotations: 54 ALR2d 830 § 5[c].

73. *Schaffer v United States* (CA5 Fla) 221 F2d 17, 54 ALR2d 820; *Bennett v State*, 201 Ark 237, 144 SW2d 476, 131 ALR 908; *People v Bravos* (1st Dist) 114 Ill App 2d 298, 252 NE2d 776, cert den 397 US 919, 25 L Ed 2d 100, 90 S Ct 927.

Generally, as to the inadmissibility of the confession of a codefendant against the defendant implicated, see 29 Am Jur 2d, Evidence §§ 538-540.

Annotations: 54 ALR2d 830 § 5[c].

74. *United States v Paternina-Vergara* (CA2 NY) 749 F2d 993, cert den 469 US 1217, 84 L Ed 2d 342, 105 S Ct 1197; *United States v Burton* (CA7 Ill) 724 F2d 1283; *United States v Donner* (CA7 Ind) 497 F2d 184, cert den 419 US 1047, 42 L Ed 2d 641, 95 S Ct 619, 95 S Ct 620; *United States v Brighton Bldg. & Maintenance Co.* (ND Ill) 435 F Supp 222, 1977-2 CCH Trade Cases ¶61764, affd (CA7 Ill) 598 F2d 1101, 1979-1 CCH Trade Cases ¶62637, 4 Fed Rules Evid Serv 769, cert den 444 US 840, 62 L Ed 2d 52, 100 S Ct 79, 100 S Ct 80; *Amidon v State* (Alaska) 565 P2d

1248, later app (Alaska) 604 P2d 575; *People v Charles*, 66 Cal 2d 330, 57 Cal Rptr 745, 425 P2d 545, cert den 389 US 872, 19 L Ed 2d 153, 88 S Ct 159; *Resnover v State*, 267 Ind 597, 372 NE2d 457, later proceeding (Ind) 501 NE2d 445; *State v Crosby* (La) 338 So 2d 584; *Commonwealth v Tiberi*, 239 Pa Super 152, 361 A2d 318; *State v King* (Tenn) 718 SW2d 241.

There was no merit to defendant's contention that the trial court erred in joining his case for trial with that of a codefendant because he was unfairly prejudiced by the admission of the codefendant's statements at their joint trial and, had he been tried separately, such evidence would have been excluded, since the codefendant's extrajudicial statements were indeed admissible against defendant under the spontaneous utterance exception to the hearsay rule. G.S. 15A-297(c)(1). *State v Porter*, 303 NC 680, 281 SE2d 377.

As to the admissibility of the confession of a codefendant assented to, see 29 Am Jur 2d, Evidence § 539.

Annotations: 54 ALR2d 830 § 13.

75. *Schaffer v United States* (CA5 Fla) 221 F2d 17, 54 ALR2d 820; *United States v Corbin Farm Service* (ED Cal) 444 F Supp 510, 8 ELR 20333, affd (CA9 Cal) 578 F2d 259, 8 ELR 20615; *Day v State*, 196 Md 384, 76 A2d 729 (not followed on other grounds by *Finke v State*, 56 Md App 450, 468 A2d 353, cert den 299 Md 425, 474 A2d 218 and cert den 469 US 1043, 83 L Ed 2d 416, 105 S Ct 529).

Annotations: 54 ALR2d 830 § 8.

76. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308; *Lopez v State*, 29 Ark App 145, 778 SW2d 641; *People v Wheeler* (1st Dist) 32 Cal App 3d 455, 108 Cal Rptr 26; *People v Nunn* (1st Dist) 184 Ill App 3d 253, 133 Ill Dec 345, 541 NE2d 182, app den (Ill) 136 Ill Dec 600, 545 NE2d 124 and cert den (US) 111 L Ed 2d 787, 110 S Ct 3277; *State v Clark*, 156 Wash 47, 286 P 69, 85 ALR 502.

Annotations: 54 ALR2d 830 § 6.

sufficiency of competent evidence of the movant's guilt;⁷⁷ the existence, or lack, of antagonism between the positions taken by the movant and his codefendant or codefendants;⁷⁸ the difficulty (or not) for the jury of separating the evidence and considering only the evidence competent against each defendant in determining his guilt or innocence;⁷⁹ the fact that the movant has himself confessed to the commission of the crime;⁸⁰ the fact that the codefendant, instead of repudiating his confession or other self-incriminating statement, has given testimony to the same effect upon the trial;⁸¹ the fact that the codefendant's testimony was subject to cross-examination;⁸² and the fact that the statement of the codefendant was not used at the trial⁸³ or that the codefendant was not in fact tried with the movant.⁸⁴

77. *Meador v United States* (CA9 Ariz) 341 F2d 381; *Allee v Commonwealth* (Ky) 454 SW2d 336, cert gr 400 US 990, 27 L Ed 2d 438, 91 S Ct 454 and cert dismd 401 US 950, 28 L Ed 2d 234, 91 S Ct 1186.

Annotations: 54 ALR2d 830 § 6.

78. § 166.

79. *People v Polk* (Cal) 44 Cal Rptr 773, 402 P2d 845, subsequent op on reh 63 Cal 2d 443, 47 Cal Rptr 1, 406 P2d 641, cert den 384 US 1010, 16 L Ed 2d 1016, 86 S Ct 1914; *People v Vigil* (Colo App) 678 P2d 554; *Jenkins v State* (Del Sup) 230 A2d 262, later app (Del Sup) 240 A2d 146, affd 395 US 213, 23 L Ed 2d 253, 89 S Ct 1677, reh den 396 US 995, 24 L Ed 2d 460, 90 S Ct 469 and (diverged from by *Griffith v Kentucky*, 479 US 314, 93 L Ed 2d 649, 107 S Ct 708, on remand (CA10 Okla) 817 F2d 674 and not followed by *People v Carrera*, 49 Cal 3d 291, 261 Cal Rptr 348, 777 P2d 121, mod 49 Cal 3d 956a and reh den, stay gr (Cal) 1990 Cal LEXIS 658 and cert den (US) 109 L Ed 2d 301, 110 S Ct 1938) as stated in *People v Hedgecock*, 51 Cal 3d 395, 272 Cal Rptr 803, 795 P2d 1260) as stated in *American Trucking Assns. v Smith* (US) 110 L Ed 2d 148, 110 S Ct 2323, later proceeding 303 Ark 183, 792 SW2d 616; *People v Cavanaugh* (3d Dept) 48 App Div 2d 949, 369 NYS2d 211, later app (3d Dept) 60 App Div 2d 663, 400 NYS2d 199; *State v Vannoy*, 25 Wash App 464, 610 P2d 380, remanded without op 93 Wash 2d 1027, on remand 27 Wash App 527, 618 P2d 1340. See also *State v Lyons*, 211 NJ Super 403, 511 A2d 1241, holding that the trial court erred in denying the motion for severance, but that the error was harmless under the circumstances of the case.

Annotations: 54 ALR2d 830 § 8.

80. *United States v Spinks* (CA7 Ind) 470 F2d 64, cert den 409 US 1011, 34 L Ed 2d 305, 93 S Ct 456 and (disagreed with by *Randolph v Parker* (CA6 Tenn) 575 F2d 1178, affd in part and revd in part 442 US 62, 60 L Ed 2d 713, 99 S Ct 2132 (diverged from by *Cruz v New*

York, 481 US 186, 95 L Ed 2d 162, 107 S Ct 1714, 22 Fed Rules Evid Serv 369, on remand 70 NY2d 733, 519 NYS2d 959, 514 NE2d 379) as stated in *People v Elston* (1st Dist) 158 Ill App 3d 652, 110 Ill Dec 533, 511 NE2d 710, app den (Ill) 113 Ill Dec 307, 515 NE2d 116); *People v Reyes* (2d Dept) 107 App Div 2d 768, 484 NYS2d 606; *Sands v State* (Okla Crim) 542 P2d 209; *State v King* (Tenn) 718 SW2d 241.

Annotations: 54 ALR2d 830 § 9.

81. *United States v Harris* (CA4 SC) 409 F2d 77; *State v Jackson*, 100 Ariz 91, 412 P2d 36, cert den 385 US 877, 17 L Ed 2d 104, 87 S Ct 157; *State v Ravenell*, 43 NJ 171, 203 A2d 13, cert den 379 US 982, 13 L Ed 2d 572, 85 S Ct 690; *State v Pope* (App) 78 NM 282, 430 P2d 779; *People v Hayes* (2d Dept) 127 App Div 2d 608, 511 NYS2d 651, app den 70 NY2d 704, 519 NYS2d 1039, 513 NE2d 716.

Annotations: 54 ALR2d 830 § 10.

82. *McCray v State* (Fla) 416 So 2d 804; *Ball v State*, 57 Md App 338, 470 A2d 361, cert den 300 Md 88, 475 A2d 1200 and cert gr 300 Md 88, 475 A2d 1200 and cert den 300 Md 90, 475 A2d 1202 and cert gr 300 Md 90, 475 A2d 1202 and affd in part and revd in part 307 Md 552, 515 A2d 1157, later proceeding 76 Md App 731, 548 A2d 161; *Commonwealth v Hicks*, 377 Mass 1, 384 NE2d 1206, habeas corpus proceeding (CA1 Mass) 859 F2d 1054, cert den 489 US 1069, 103 L Ed 2d 817, 109 S Ct 1349; *People v Palmer* (2d Dept) 134 App Div 2d 462, 521 NYS2d 84, app den 71 NY2d 900, 527 NYS2d 1010, 523 NE2d 317; *State v Hensley* (Tenn Crim) 656 SW2d 410.

Annotations: 54 ALR2d 830 § 10.5.

83. *Bailey v United States* (CA10 Kan) 410 F2d 1209, cert den 396 US 933, 24 L Ed 2d 232, 90 S Ct 276; *De Herrera v United States* (CA10 NM) 339 F2d 587; *State v Curley*, 253 SC 513, 171 SE2d 699, cert den 400 US 834, 27 L Ed 2d 66, 91 S Ct 69 and cert den 400 US 834, 27 L Ed 2d 66, 91 S Ct 70 and later app 257 SC 68, 184 SE2d 80.

Annotations: 54 ALR2d 830 § 11.

Practice guide: The movant's request for severance should contain a detailed statement of the grounds upon which he relies. Where the movant's allegations, upon his motion, are phrased in terms of mere conclusions, the motion is properly denied.⁸⁵

§ 168. —Effect of redaction of codefendant's confession

In many cases it has been held that a motion for severance may properly be denied where a codefendant's confession has been redacted or edited by the prosecution's deletion of all references to the moving defendant⁸⁶ or by substitution of neutral words in place of defendant's name.⁸⁷ However, where such redaction or revision will not satisfactorily negate the prejudicial effect of the codefendant's confession, severance must be ordered by the court.⁸⁸

Observation: In some jurisdictions, by statute, the trial judge must either delete all references to the objecting defendant or grant codefendant a separate trial, and the failure of the trial judge to grant either type of relief when the confession of one defendant implicates a codefendant is reversible error.⁸⁹

§ 169. Testimony of codefendant or other incompetent witness

One seeking severance on the grounds that he needs the testimony of a codefendant must clearly show that the codefendant would waive his Fifth Amendment privilege against self-incrimination⁹⁰ and testify in a separate trial,⁹¹ that there is a bona fide need for the codefendant's testimony,⁹² that

84. *Samuels v State*, 123 Fla 280, 166 So 743.

Annotations: 54 ALR2d 830 § 12.

85. *People v Hayes* (2d Dept) 127 App Div 2d 608, 511 NYS2d 651, app den 70 NY2d 704, 519 NYS2d 1039, 513 NE2d 716; *State v Miles*, 34 Wash 2d 55, 207 P2d 1209.

Annotations: 54 ALR2d 830 § 14.

Forms: Motion—For severance of defendants—Prejudicial joinder on basis of co-defendant's statement to authorities. 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Form 183.1.

86. *United States v Soriano* (CA9 Guam) 880 F2d 192 (recognizing rule); *United States v Grant* (CA4 Va) 549 F2d 942, vacated 435 US 912, 55 L Ed 2d 502, 98 S Ct 1463; *People v Allen* (1st Dist) 36 Ill App 3d 821, 344 NE2d 825; *Jenkins v State*, 274 Ind 140, 409 NE2d 591; *Cooks v State* (Okla Crim) 699 P2d 653, cert den 474 US 935, 88 L Ed 2d 275, 106 S Ct 268. See also *Pohl v State*, 96 Wis 2d 290, 291 NW2d 554 (trial court properly denied defendant's motion for severance where judge instructed police officer to excise statement by codefendant implicating defendant during his testimony concerning oral confession made to him by the codefendant).

87. *Carpenter v United States* (Dist Col App) 430 A2d 496, cert den 454 US 852, 70 L Ed 2d 143, 102 S Ct 295 (use of term "accomplice");

Scott v State (Ind) 425 NE2d 637 (use of word "blank"); *State v Herd*, 14 Wash App 959, 546 P2d 1222, review den 88 Wash 2d 1005, habeas corpus proceeding (CA9 Wash) 792 F2d 1441, withdrawn (use of phrase "another person").

88. *Sims v State* (1977) 265 Ind 647, 358 NE2d 746; *State v Haskell*, 100 NJ 469, 495 A2d 1341. See also *Carter v State* (Ind) 361 NE2d 145, cert den 434 US 866, 54 L Ed 2d 142, 98 S Ct 202, and *State v Lyons*, 211 NJ Super 403, 511 A2d 1241, recognizing the rule but holding that the failure to order severance was harmless error under the facts.

89. *State v Pacheco* (RI) 481 A2d 1009.

90. *United States v Blanco* (CA6 Ky) 844 F2d 344, cert den 486 US 1046, 100 L Ed 2d 626, 108 S Ct 2042; *United States v Long* (SD NY) 697 F Supp 651, later proceeding (CA2 NY) 917 F2d 691, 135 BNA LRRM 2812, 31 Fed Rules Evid Serv 526.

91. *United States v Studley* (CA7 Ill) 892 F2d 518, 29 Fed Rules Evid Serv 1038; *United States v Castro* (CA9 Cal) 887 F2d 988, 28 Fed Rules Evid Serv 1479; *United States v Wilson* (CA5 Tex) 657 F2d 755, 9 Fed Rules Evid Serv 215, cert den 455 US 951, 71 L Ed 2d 667, 102 S Ct 1456; *United States v Anthony* (CA8 Mo) 565 F2d 533, 2 Fed Rules Evid Serv 814, cert den 434 US 1079, 55 L Ed 2d 787, 98 S

such testimony would be exculpatory,⁹³ and that a joint trial in such a case would result in compelling and undue prejudice,⁹⁴ resulting in denial of a fair trial.⁹⁵

The court does not abuse its discretion in denying defendant's motion for severance where the codefendant's testimony, if given, would lack credibility⁹⁶

Ct 1274; *United States v Borish* (ED Pa) 452 F Supp 518; *United States v Stone* (ED Wis) 444 F Supp 1254, *affd* without op (CA7 Wis) 588 F2d 834; *United States v Armco Steel Corp.* (WD Mo) 438 F Supp 847.

Unsupported or bare assertions that codefendant will testify are insufficient. *United States v Dickens* (CA3 NJ) 695 F2d 765, *cert den* 460 US 1092, 76 L Ed 2d 359, 103 S Ct 1792 and *cert den* 461 US 909, 76 L Ed 2d 812, 103 S Ct 1883; *United States v Boscia* (CA3 Pa) 573 F2d 827, *cert den* 436 US 911, 56 L Ed 2d 411, 98 S Ct 2248, *reh den* 438 US 908, 57 L Ed 2d 1152, 98 S Ct 3130 and *cert den* 439 US 854, 58 L Ed 2d 160, 99 S Ct 165; *United States v Borish* (ED Pa) 452 F Supp 518; *United States v Aloï* (ED NY) 449 F Supp 698.

Defendant may be denied severance where he fails to show that codefendants would testify or what their testimony would be. *United States v Feola* (SD NY) 651 F Supp 1068 (*disagreed with on other grounds by* *Wabash Valley Power Asso. v Public Service Co.* (SD Ind) 678 F Supp 757, *CCH Fed Secur L Rep* ¶ 93724) and *affd* without op (CA2 NY) 875 F2d 857, *cert den* (US) 107 L Ed 2d 72, 110 S Ct 110.

92. *United States v Di Bernardo* (CA11 Fla) 880 F2d 1216; *United States v Ford*, 276 App DC 315, 870 F2d 729; *United States v Bovain* (CA11 Ga) 708 F2d 606, 13 Fed Rules Evid Serv 1123, *cert den* 464 US 898, 78 L Ed 2d 238, 104 S Ct 251 and *cert den* 464 US 997, 78 L Ed 2d 690, 104 S Ct 497 and *cert den* 464 US 1018, 78 L Ed 2d 724, 104 S Ct 551.

Statement that codefendant's testimony would be *helpful* to defense is insufficient. *United States v Long* (SD NY) 697 F Supp 651, *later proceeding* (CA2 NY) 917 F2d 691, 135 BNA LRRM 2812, 31 Fed Rules Evid Serv 526.

93. *United States v Studley* (CA7 Ill) 892 F2d 518, 29 Fed Rules Evid Serv 1038; *United States v Kane* (CA5 Tex) 887 F2d 568, *cert den* (US) 107 L Ed 2d 1062, 110 S Ct 1159; *United States v Grapp* (CA5 La) 653 F2d 189, 8 Fed Rules Evid Serv 1661; *United States v Smolar* (CA1 Mass) 557 F2d 13, *CCH Fed Secur L Rep* ¶ 96069, *cert den* 434 US 866, 54 L Ed 2d 143, 98 S Ct 203 and *cert den* 434 US 966, 54 L Ed 2d 453, 98 S Ct 508 and *cert den* 434 US 971, 54 L Ed 2d 461, 98 S Ct 523; *United States v Borish* (ED Pa) 452 F Supp 518; *United States v Aloï* (ED NY) 449 F Supp

698; *United States v Stone* (ED Wis) 444 F Supp 1254, *affd* without op (CA7 Wis) 588 F2d 834; *Huffman v State* (Ind) 543 NE2d 360, *cert den* (US) 111 L Ed 2d 767, 110 S Ct 3257 and (*ovrld* on other grounds by *Street v State* (Ind) 567 NE2d 102).

Fact that codefendant exculpates defendant before grand jury in sworn testimony demonstrates likelihood he would do same in defendant's trial if he were not being tried in same proceeding, and it is not necessary to prove to certainty that codefendant would be available and willing to so testify. *United States v Starr* (CA8 Iowa) 584 F2d 235, *cert den* 439 US 1115, 59 L Ed 2d 73, 99 S Ct 1019.

Defendant seeking severance must provide facts as to nature, extent, and importance of exculpatory testimony which he expects codefendant to give; but it is not necessary that defendant demonstrate nature of codefendant's testimony through sworn testimony. *United States v Kozell* (ED Pa) 468 F Supp 746.

94. *United States v Ascarrunz* (CA5 Tex) 838 F2d 759, 24 Fed Rules Evid Serv 1166; *United States v Armstrong* (CA9 Cal) 654 F2d 1328, *cert den* 454 US 1157, 71 L Ed 2d 315, 102 S Ct 1032 and *cert den* 455 US 926, 71 L Ed 2d 470, 102 S Ct 1289; *Huffman v State* (Ind) 543 NE2d 360, *cert den* (US) 111 L Ed 2d 767, 110 S Ct 3257 and (*ovrld* on other grounds by *Street v State* (Ind) 567 NE2d 102).

95. *United States v Ruppel* (CA5 Tex) 666 F2d 261, 9 Fed Rules Evid Serv 1170, *reh den* (CA5 Tex) 671 F2d 1378 and *cert den* 458 US 1107, 73 L Ed 2d 1369, 102 S Ct 3487, *reh den* 458 US 1132, 73 L Ed 2d 1402, 103 S Ct 17, *later proceeding* (CA5 Tex) 724 F2d 507, *later proceeding* (CA5 Tex) 725 F2d 1007 and *reh den* (CA5 Tex) 729 F2d 779; *United States v Dennis* (CA5 Ala) 645 F2d 517, *reh den* (CA5 Ala) 655 F2d 235 and *cert den* 454 US 1034, 70 L Ed 2d 478, 102 S Ct 573; *United States v Lov-It Creamery, Inc.* (ED Wis) 704 F Supp 1532, *mod on other grounds* (CA7 Wis) 895 F2d 410; *United States v Long* (SD NY) 697 F Supp 651, *later proceeding* (CA2 NY) 917 F2d 691, 135 BNA LRRM 2812, 31 Fed Rules Evid Serv 526.

96. *United States v Alejandro* (CA5 Tex) 527 F2d 423, *cert den* 426 US 923, 49 L Ed 2d 377, 96 S Ct 2632, *reh den* 429 US 875, 50 L Ed 2d 159, 97 S Ct 199 and *cert den* 429 US 844, 50 L Ed 2d 115, 97 S Ct 124.

or only be cumulative,⁹⁷ where the possibility of the codefendant testifying is speculative,⁹⁸ where the codefendant invokes his Fifth Amendment privilege and does not testify,⁹⁹ or where, although the codefendant purportedly waives his Fifth Amendment privilege against self-incrimination, the waiver is illusory.¹

(2) ANTAGONISTIC DEFENSES [§§ 170-175]

§ 170. Generally

Although a motion for severance or a separate trial on the ground that the defenses of the defendants are antagonistic is addressed to the discretion of the trial court,² numerous cases have recognized that separate trials should be allowed where the defenses of the codefendants are antagonistic to each other.³

97. *United States v Holcomb* (CA5 Tex) 797 F2d 1320 (diverged from on other grounds by *United States v Edelman* (CA5 Tex) 873 F2d 791, 27 Fed Rules Evid Serv 985, reh den, en banc (CA5 Tex) 877 F2d 972).

98. *United States v Oxford* (CA7 Ill) 735 F2d 276; *People v Wallace* (2d Dept) 153 App Div 2d 59, 549 NYS2d 515, app den 75 NY2d 925, 555 NYS2d 44, 554 NE2d 81; *State v Baker* (Tenn Crim) 751 SW2d 154, post-conviction proceeding (Tenn Crim) 1990 Tenn Crim App LEXIS 411.

99. *United States v Kord* (CA7 Ill) 836 F2d 368, 24 Fed Rules Evid Serv 642, cert den 488 US 824, 102 L Ed 2d 49, 109 S Ct 72.

Defendant was not entitled to severance based on theory that her husband used his Fifth Amendment right against self-incrimination, thereby depriving her of his exculpatory testimony; any exculpatory testimony by husband would have been subject to impeachment by government witnesses, and therefore any error was harmless. *United States v Mercer* (CA8 Mo) 853 F2d 630, reh den, en banc (CA8) 1988 US App LEXIS 12840 and cert den 488 US 996, 102 L Ed 2d 591, 109 S Ct 566 and cert den 490 US 1110, 104 L Ed 2d 1028, 109 S Ct 3166.

1. *United States v Blanco* (CA6 Ky) 844 F2d 344, cert den 486 US 1046, 100 L Ed 2d 626, 108 S Ct 2042.

2. *Commonwealth v Horton*, 376 Mass 380, 380 NE2d 687, cert den 440 US 923, 59 L Ed 2d 477, 99 S Ct 1252; *State v Turnbow*, 67 NM 241, 354 P2d 533, 89 ALR2d 461; *State v Francis*, 152 SC 17, 149 SE 348, 70 ALR 1133.

3. *United States v Johnson* (CA5 Ga) 478 F2d 1129; *United States v Gallagher* (CA7 Ill) 437 F2d 1191, cert den 402 US 1009, 29 L Ed 2d 430, 91 S Ct 2190 (recognizing rule); *De Luna v United States* (CA5 Tex) 308 F2d 140, 1 ALR3d 969, reh den (CA5 Tex) 324 F2d 375;

United States v Joyner (ND Ill) 669 F Supp 226, affd (CA7 Ill) 870 F2d 1304; *United States v Valdes* (DC Puerto Rico) 262 F Supp 474; *People v Quintana*, 189 Colo 330, 540 P2d 1097 (recognizing conflicting defenses as one of several criteria); *State v Varricchio*, 176 Conn 445, 408 A2d 239; *Jenkins v State* (Del Sup) 230 A2d 262, later app (Del Sup) 240 A2d 146, affd 395 US 213, 23 L Ed 2d 253, 89 S Ct 1677, reh den 396 US 995, 24 L Ed 2d 460, 90 S Ct 469 (at least a factor); *Johnson v United States* (Dist Col App) 398 A2d 354; *Thomas v State* (Fla App D4) 297 So 2d 850; *Reeves v State*, 237 Ga 1, 226 SE2d 567; *State v Yoshino*, 50 Hawaii 287, 439 P2d 666; *People v Bean*, 109 Ill 2d 80, 92 Ill Dec 538, 485 NE2d 349, later app 137 Ill 2d 65, 147 Ill Dec 891, 560 NE2d 258, cert den (US) 113 L Ed 2d 270, 111 S Ct 1338; *State v Martin*, 234 Kan 548, 673 P2d 104, later app 237 Kan 285, 699 P2d 486; *Tinsley v Commonwealth* (Ky) 495 SW2d 776, cert den 414 US 1077, 38 L Ed 2d 484, 94 S Ct 595 and cert den 414 US 1145, 39 L Ed 2d 101, 94 S Ct 898; *State v Barkley* (La) 412 So 2d 1380; *Day v State*, 196 Md 384, 76 A2d 729 (not followed on other grounds by *Finke v State*, 56 Md App 450, 468 A2d 353, cert den 299 Md 425, 474 A2d 218 and cert den 469 US 1043, 83 L Ed 2d 416, 105 S Ct 529); *People v Muhammad*, 170 Mich App 747, 428 NW2d 762, app den 432 Mich 888; *People v Carter* (2d Dept) 86 App Div 2d 451, 450 NYS2d 203; *State v Simmons*, 65 NC App 294, 309 SE2d 493; *Murray v State* (Okla Crim) 528 P2d 739, later app (Okla Crim) 562 P2d 1157; *State v Clarke* (RI) 448 A2d 1208; *State v Suits*, 73 Wis 2d 352, 243 NW2d 206 (recognizing rule).

As to the right to separate trials in civil cases on the ground of antagonistic defenses, see § 155.

Annotations: Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245 § 3.

■■■■ Observation: While antagonistic defenses seem to be a well-recognized ground for a separate trial, the cases reveal an apparent reluctance on the part of trial courts to grant a severance upon this ground and by appellate courts to find reversible error in the denial of severance by the trial court.

The mere allegation of antagonistic defenses,⁴ the mere apprehension that the defenses may prove to be antagonistic,⁵ or the fact that there is hostility

Forms: Affidavit in support of motion for severance—Prejudicial joinder of defendants—Admission of confession by codefendant implicating defendant—Antagonistic defenses. 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Form 117.

4. *United States v Toro* (CA5 Tex) 840 F2d 1221; *United States v Polizzi* (CA9 Cal) 801 F2d 1543, 21 Fed Rules Evid Serv 1257; *United States v Spitler* (CA4) 800 F2d 1267 (disagreed with by multiple cases as stated in *United States v Boylan* (CA1 Mass) 898 F2d 230, 29 Fed Rules Evid Serv 1223, cert den (US) 112 L Ed 2d 106, 111 S Ct 139); *United States v Bautista* (CA1 Mass) 731 F2d 97, 15 Fed Rules Evid Serv 822; *United States v Russell* (CA11 Fla) 703 F2d 1243, 13 Fed Rules Evid Serv 13, reh den (CA11 Fla) 708 F2d 734; *United States v Provenzano* (CA3 NJ) 688 F2d 194, 11 Fed Rules Evid Serv 352, cert den 459 US 1071, 74 L Ed 2d 634, 103 S Ct 492; *United States v Banks* (CA7 Ind) 687 F2d 967, 11 Fed Rules Evid Serv 1036, cert den 459 US 1212, 75 L Ed 2d 448, 103 S Ct 1208; *United States v Herring* (CA5 Ga) 602 F2d 1220, 4 Fed Rules Evid Serv 1429, reh den (CA5 Ga) 606 F2d 321 and cert den 444 US 1046, 62 L Ed 2d 732, 100 S Ct 734; *United States v McPartlin* (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65; *United States v Perez* (CA5 La) 489 F2d 51, reh den (CA5 La) 488 F2d 552 and cert den 417 US 945, 41 L Ed 2d 664, 94 S Ct 3067, 94 S Ct 3068; *United States v Harris* (ED Pa) 700 F Supp 226, affd (CA3 Pa) 874 F2d 123; *United States v Gonzalez* (SD NY) 698 F Supp 531; *United States v Kelley* (ED Wis) 120 FRD 103; *State v Politte* (App) 136 Ariz 117, 664 P2d 661; *Davis v State* (App) 268 Ark 1154, 599 SW2d 424; *People v Thornton* (Colo App) 712 P2d 1095, revd on other grounds, en banc (Colo) 716 P2d 1115; *State v De Witt*, 177 Conn 637, 419 A2d 861; *Abiff v State*, 258 Ga 137, 365 SE2d 427, later proceeding 260 Ga 434, 396 SE2d 483, cert den (US) 112 L Ed 2d 858, 111 S Ct 797, reh den (US) 113 L Ed 2d 273, 111 S Ct 1342; *People v Ruiz*, 94 Ill 2d 245, 68 Ill Dec 890, 447 NE2d 148, cert den 462 US 1112, 77 L Ed 2d 1341, 103 S Ct 2465, reh den 463 US 1236, 77 L Ed 2d 1452, 104 S Ct 31, later proceeding 107 Ill 2d 19, 88 Ill Dec 902, 479 NE2d 922, later app

132 Ill 2d 1, 138 Ill Dec 201, 547 NE2d 170, cert den (US) 110 L Ed 2d 652, 110 S Ct 2632; *State v Van Pham*, 234 Kan 649, 675 P2d 848; *Slone v Commonwealth* (Ky App) 677 SW2d 894; *State v Jones* (La) 408 So 2d 1285; *Commonwealth v Dickerson*, 17 Mass App 960, 457 NE2d 1141, review den 391 Mass 1103, 461 NE2d 1219; *People v Byrd*, 133 Mich App 767, 350 NW2d 802; *Duckworth v State* (Miss) 477 So 2d 935; *State v Pelton*, 197 Neb 412, 249 NW2d 484; *People v Anfossi* (2d Dept) 125 App Div 2d 317, 508 NYS2d 601; *Hope v State* (Okla Crim) 732 P2d 905; *Rajski v State* (Tex App Houston (14th Dist)) 715 SW2d 832 (disapproved on other grounds by *Rutledge v State* (Tex Crim) 749 SW2d 50, motion for rehearing on PDR denied (Apr 27, 1988)); *State v Hall* (Utah) 712 P2d 229, later proceeding (Utah) 721 P2d 502, 37 Utah Adv Rep 5.

In prosecution for sports bribery, in which defendant's counsel asserted, in hearing on motion to sever, that defendant's defense was antagonistic to codefendant's defense, trial court did not err in denying motion to sever where nothing in trial record showed that defendant's defense was antagonistic in fact. *State v Rubbico* (La App 4th Cir) 550 So 2d 219, cert den (La) 556 So 2d 1258.

Trial court did not err in denying defendant's motion where defendant's counsel offered no evidence to support claim that but for joint trial defendant would have testified to facts that were in some way antagonistic to codefendant's position. *People v Martin* (2d Dept) 154 App Div 2d 54, 546 NYS2d 394, app den 75 NY2d 815, 552 NYS2d 565, 551 NE2d 1243.

Annotations: 82 ALR3d 245 § 4.

5. *United States v Amer* (CA11 Fla) 824 F2d 906, cert den 484 US 1068, 98 L Ed 2d 996, 108 S Ct 1033; *United States v Benz* (CA11 Fla) 740 F2d 903, reh den, en banc (CA11 Fla) 756 F2d 885 and cert den 474 US 817, 88 L Ed 2d 51, 106 S Ct 62; *United States v Wilson*, 140 App DC 220, 434 F2d 494 (applying District of Columbia law); *United States v Doby* (ND Ind) 665 F Supp 705, later proceeding (ND Ind) 684 F Supp 558, affd (CA7 Ind) 872 F2d 779 (disagreed with by multiple cases as stated in *United States v Miller* (CA4 Va) 1991 US App LEXIS 3564); *Sawyer v State*, 100 Fla 1603, 132 So 188; *People v Harris*, 123 Ill 2d

between the defendant and codefendants⁶ or between counsel,⁷ will not be sufficient to require a severance. A statement of a codefendant implicating himself but not the defendant has been held to be beneficial to the defendant and not to be an antagonistic defense warranting a severance.⁸ And refusal of a severance is proper where the defenses are corroborative, supportive, mutually inclusive, and virtually identical.⁹

Where one defendant presents no defense at all, such defendant cannot claim that his defense was inconsistent and irreconcilable with the defense of his codefendants.¹⁰

Caution: Care should be taken not to confuse antagonistic defenses with evidence antagonistic to the defenses raised.¹¹

The general principles regarding antagonistic defenses discussed in this and

113, 122 Ill Dec 76, 526 NE2d 335, cert den 488 US 902, 102 L Ed 2d 240, 109 S Ct 251, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 3192, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 12854; State v Van Pham, 234 Kan 649, 675 P2d 848; State v Hurt, 212 SC 461, 48 SE2d 313.

Annotations: 82 ALR3d 245 § 8.

6. United States v Sherlock (CA9 Ariz) 865 F2d 1069; United States v Drougas (CA1 Mass) 748 F2d 8, 16 Fed Rules Evid Serv 1002 (disagreed with on other grounds by Cola v Reardon (CA1 Mass) 787 F2d 681, cert den 479 US 930, 93 L Ed 2d 351, 107 S Ct 398) and (disagreed with on other grounds by United States v Lau (CA1 Puerto Rico) 828 F2d 871, 23 Fed Rules Evid Serv 881, cert den 486 US 1005, 100 L Ed 2d 194, 108 S Ct 1729) (impliedly recognizing rule); United States v Davis (CA8 Ark) 747 F2d 440; United States v Puckett (CA10 Okla) 692 F2d 663, 10 Fed Rules Evid Serv 1348, cert den 459 US 1091, 74 L Ed 2d 939, 103 S Ct 579 and cert den 460 US 1024, 75 L Ed 2d 497, 103 S Ct 1276; United States v Harris (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558 and (disagreed with by multiple cases as stated in United States v Esposito (CA2 NY) 834 F2d 272); United States v Perez (CA5 La) 489 F2d 51, reh den (CA5 La) 488 F2d 552 and cert den 417 US 945, 41 L Ed 2d 664, 94 S Ct 3067, 94 S Ct 3068; United States v Troutman (CA10 Kan) 458 F2d 217 (recognizing rule); United States v Kozloski (CA9 Nev) 453 F2d 889; Allen v United States, 91 App DC 197, 202 F2d 329, cert den 344 US 869, 97 L Ed 674, 73 S Ct 112 (applying District of Columbia law); United States v Louie (SD NY) 625 F Supp 1327, app dismd (CA2 NY) 787 F2d 65; United States v Bronk (WD Wis) 604 F Supp 743; Brown v State, 259 Ark 464, 534 SW2d 207; People v Jones (5th Dist) 10 Cal App 3d 237, 88 Cal Rptr 871; People v Brown (2d Dist) 27 Ill App 3d 569, 327 NE2d 51; State v Snodgrass (Iowa)

346 NW2d 472; State v Van Pham, 234 Kan 649, 675 P2d 848.

Annotations: 82 ALR3d 245 § 9.

7. United States v Deveau (CA5 Tex) 734 F2d 1023, CCH Fed Secur L Rep ¶91536, reh den (CA5 Tex) 738 F2d 437 and cert den 469 US 1158, 83 L Ed 2d 921, 105 S Ct 906; State v Powers (Me) 386 A2d 721.

Annotations: 82 ALR3d 245 § 9.5.

8. United States v Bruno (CA5 La) 809 F2d 1097, 22 Fed Rules Evid Serv 648, cert den 481 US 1057, 95 L Ed 2d 853, 107 S Ct 2198, habeas corpus proceeding (CA5 La) 903 F2d 393, reh den (CA5) 1990 US App LEXIS 14018; United States v Webster (CA5 Tex) 734 F2d 1048, reh den (CA5 Tex) 739 F2d 633 and cert den 469 US 1073, 83 L Ed 2d 506, 105 S Ct 565; United States v Frazier (CA4 Md) 394 F2d 258, cert den 393 US 984, 21 L Ed 2d 445, 89 S Ct 457; Hudson v State, 147 Ga App 524, 249 SE2d 333; People v Albers, 360 Ill 73, 195 NE 459; State v Vale, 252 La 1056, 215 So 2d 811, revd on other grounds 399 US 30, 26 L Ed 2d 409, 90 S Ct 1969.

But in prosecution for violation of bank laws in which all defendants but one had signed agreement that appeared to concede charges in indictment, nonsigning defendant was entitled to separate trial notwithstanding prosecution argument that it did not intend to rely primarily upon the agreement. United States v Coriat (ND Ill) 431 F Supp 45.

Annotations: 82 ALR3d 245 § 7.

9. Gibson v State (Ala App) 555 So 2d 784, reh overr (Ala App) 1989 Ala Crim App LEXIS 2323, cert den (Ala) 1990 Ala LEXIS 69.

10. United States v Kane (CA5 Tex) 887 F2d 568, cert den (US) 107 L Ed 2d 1062, 110 S Ct 1159.

11. United States v Frazier (CA4 Md) 394 F2d 258, cert den 393 US 984, 21 L Ed 2d 445, 89 S Ct 457.

succeeding sections of this article have been applied in prosecutions for a wide variety of criminal offenses.¹²

§ 171. Requirement of prejudice

It is generally held that an antagonistic defense alone is not sufficient to require a separate trial, but that harm or prejudice by a joint trial must be shown.¹³ Some cases have indicated that the test for determining whether a severance should be granted is whether the defenses are so antagonistic that a fair trial can be assured only by a severance.¹⁴

Although antagonistic defenses prejudicing one of several defendants may

12. Annotations: Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245 §§ 12-30.

13. *United States v Long* (CA8 Minn) 857 F2d 436, 27 Fed Rules Evid Serv 214, habeas corpus proceeding (CA8) 1991 US App LEXIS 3531; *United States v Scott* (CA5 La) 854 F2d 697; *Person v Miller* (CA4 NC) 854 F2d 656, 26 Fed Rules Evid Serv 1047, 96 ALR Fed 495, cert den 489 US 1011, 103 L Ed 2d 182, 109 S Ct 1119; *United States v Simon* (CA11 Fla) 839 F2d 1461, 25 Fed Rules Evid Serv 92, cert den 487 US 1223, 101 L Ed 2d 917, 108 S Ct 2883 and cert den 488 US 861, 102 L Ed 2d 129, 109 S Ct 158; *United States v Garner* (CA7 Ill) 837 F2d 1404, 24 Fed Rules Evid Serv 476, cert den 486 US 1035, 100 L Ed 2d 608, 108 S Ct 2022 and cert den 487 US 1240, 101 L Ed 2d 945, 108 S Ct 2914 and cert den 488 US 898, 102 L Ed 2d 232, 109 S Ct 244; *United States v McDonald* (CA5 Tex) 837 F2d 1287, 24 Fed Rules Evid Serv 1054; *United States v Valles-Valencia* (CA9 Ariz) 811 F2d 1232, amd (CA9 Ariz) 823 F2d 381, 23 Fed Rules Evid Serv 364 (disagreed with on other grounds by *United States v Suntar Roofing, Inc.* (CA10 Kan) 897 F2d 469, 1990-1 CCH Trade Cases ¶ 68936, 29 Fed Rules Evid Serv 1170 (disagreed with on other grounds by *United States v Bucuvalas* (CA1 Mass) 909 F2d 593)); *United States v Davis* (CA8 Ark) 747 F2d 440; *United States v Potamitis* (CA2 NY) 739 F2d 784, 15 Fed Rules Evid Serv 1747, cert den 469 US 918, 83 L Ed 2d 232, 105 S Ct 297, post-conviction proceeding (SD NY) 666 F Supp 43, on reconsideration (SD NY) 1988 US Dist LEXIS 5357, later proceeding (SD NY) 1988 US Dist LEXIS 5332, affd (CA2 NY) 862 F2d 423 and cert den 469 US 934, 83 L Ed 2d 269, 105 S Ct 332, later proceeding (SD NY) 611 F Supp 1033, later proceeding (SD NY) 611 F Supp 1046, later proceeding (SD NY) 606 F Supp 1390, later proceeding (SD NY) 609 F Supp 881 and affd without op (CA2 NY) 779 F2d 40; *United States v Calabrese* (CA10 Utah) 645 F2d 1379, 7 Fed Rules Evid Serv 1666, cert den 451 US 1018, 69 L Ed 2d 390, 101 S Ct 3008 and cert den 454 US 831, 70 L Ed 2d 108, 102 S Ct 127 and (disagreed with on

other grounds by *Innes v Dalsheim* (CA2 NY) 864 F2d 974, cert den (US) 107 L Ed 2d 19, 110 S Ct 50; *United States v Bautista* (CA1 Mass) 731 F2d 97, 15 Fed Rules Evid Serv 822; *United States v Kendricks* (CA6 Mich) 623 F2d 1165, 6 Fed Rules Evid Serv 1298; *United States v Harris* (ED Pa) 700 F Supp 226, affd (CA3 Pa) 874 F2d 123; *United States v Chapman* (SD Ohio) 501 F Supp 704; *United States v Diamond* (DC Md) 492 F Supp 583; *Lewis v State*, 220 Ark 914, 251 SW2d 490; *State v McCarthy*, 130 Conn 101, 31 A2d 921; *Hamilton v United States* (Dist Col App) 395 A2d 24; *Harrell v State*, 253 Ga 474, 321 SE2d 739; *People v Olinger*, 112 Ill 2d 324, 97 Ill Dec 772, 493 NE2d 579, cert den 479 US 1101, 94 L Ed 2d 180, 107 S Ct 1329, reh den 481 US 1025, 95 L Ed 2d 520, 107 S Ct 1914; *Marx v State*, 236 Ind 455, 141 NE2d 126; *State v Snodgrass* (Iowa) 346 NW2d 472; *State v Van Pham*, 234 Kan 649, 675 P2d 848; *Rachel v Commonwealth* (Ky) 523 SW2d 395; *State v Barkley* (La) 412 So 2d 1380; *State v Langill* (Me) 567 A2d 440; *Commonwealth v Dickerson*, 17 Mass App 960, 457 NE2d 1141, review den 391 Mass 1103, 461 NE2d 1219; *People v Partee*, 130 Mich App 119, 342 NW2d 903; *State v Green*, 321 NC 594, 365 SE2d 587, cert den 488 US 900, 102 L Ed 2d 235, 109 S Ct 247; *Commonwealth v Doa*, 381 Pa Super 181, 553 A2d 416; *State v Gibbons* (RI) 418 A2d 830; *State v No Heart* (SD) 353 NW2d 43; *Rajski v State* (Tex App Houston (14th Dist)) 715 SW2d 832 (disapproved by *Rutledge v State* (Tex Crim) 749 SW2d 50, motion for rehearing on PDR denied (Apr 27, 1988)); *State v Barry*, 25 Wash App 751, 611 P2d 1262.

Evidence of prior criminal offenses relating only to one defendant does not generate prejudice arising to level requiring severance. *United States v McClure* (CA10 NM) 734 F2d 484, 15 Fed Rules Evid Serv 1667.

Annotations: Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245 § 5.

14. *People v Brooks*, 51 Ill 2d 156, 281 NE2d 326; *People v Davis* (1st Dist) 43 Ill App 3d 603, 2 Ill Dec 119, 357 NE2d 96.

justify a separate trial for that defendant, nevertheless separate trials will not be granted in behalf of the other defendants not prejudiced thereby.¹⁵

§ 172. Defendant attempting to place guilt on codefendant

The cases are not entirely consistent on the question of the sufficiency of a ground for severance of one defendant attempting to escape conviction by placing the guilt on his codefendant. In some cases the courts have held that this was not sufficient.¹⁶ Thus, for example, in a RICO prosecution, the possibility that the trial could divide into factional disputes in which some defendants would seek to focus blame on other groups of defendants did not require severance where it was unlikely that any defendant could rely upon hostility as the core of his defense.¹⁷ Similarly, the trial court in a murder prosecution properly denied motions for severance, where, although the defenses were essentially antagonistic, with each defendant seeking to place the murder weapon in the hands of the other, no evidence inadmissible against either was admitted, and the prosecution made a strong case against

15. See *United States v Noble* (DC Mont) 294 F 689, *aff'd* (CA9 Mont) 300 F 689, where the court stated that although an antagonistic defense calculated to prejudice one of several defendants jointly accused would move the court in its discretion to grant that particular defendant a separate trial, nevertheless such a defense was not a ground for a separate trial in behalf of the others not prejudiced thereby.

16. *Young v Miller* (CA6 Mich) 883 F2d 1276, *reh den, en banc* (CA6) 1989 US App LEXIS 19129; *United States v McClure* (CA10 NM) 734 F2d 484, 15 Fed Rules Evid Serv 1667; *United States v Miller* (CA8 SD) 725 F2d 462, 14 Fed Rules Evid Serv 1656 (impliedly recognizing rule); *United States v Arruda* (CA1 Mass) 715 F2d 671, 13 Fed Rules Evid Serv 1979; *United States v Puckett* (CA10 Okla) 692 F2d 663, 10 Fed Rules Evid Serv 1348, *cert den* 459 US 1091, 74 L Ed 2d 939, 103 S Ct 579 and *cert den* 460 US 1024, 75 L Ed 2d 497, 103 S Ct 1276; *United States v Talavera* (CA1 Puerto Rico) 668 F2d 625, 9 Fed Rules Evid Serv 1055, *cert den* 456 US 978, 72 L Ed 2d 853, 102 S Ct 2245; *United States v Herring* (CA5 Ga) 602 F2d 1220, 4 Fed Rules Evid Serv 1429, *reh den* (CA5 Ga) 606 F2d 321 and *cert den* 444 US 1046, 62 L Ed 2d 732, 100 S Ct 734; *United States v McPartlin* (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, *cert den* 444 US 833, 62 L Ed 2d 43, 100 S Ct 65; *United States v Brady* (CA9 Mont) 579 F2d 1121, *cert den* 439 US 1074, 59 L Ed 2d 41, 99 S Ct 849; *United States v Kalevas* (SD NY) 622 F Supp 1523; *United States v H & M, Inc.* (MD Pa) 562 F Supp 651, 1983-1 CCH Trade Cases ¶ 65392, 13 Fed Rules Evid Serv 283; *Ringstaff v Mintzes* (ED Mich) 539 F Supp 1124; *United States v Dugger* (DC Tenn) 422 F Supp 1342; *Burton v State* (Sup) 51 Del 546, 149 A2d 337; *Allen v United States*, 91 App DC 197, 202 F2d 329, *cert den* 344 US 869, 97

L Ed 674, 73 S Ct 112; *Dean v State* (Fla) 478 So 2d 38, 10 FLW 580; *Alfonso v State* (Fla App D3) 528 So 2d 383, 13 FLW 275, *review den* (Fla) 528 So 2d 1183, *later app* (Fla App D3) 561 So 2d 1207, 15 FLW 987, *reh den* (Fla App D3) 15 FLW 1700, *later app* (Fla App D3) 569 So 2d 521, 15 FLW 2781, *review den* (Fla) 1991 Fla LEXIS 582 and *review den* (Fla) 1990 Fla LEXIS 1805; *People v Ruiz*, 94 Ill 2d 245, 68 Ill Dec 890, 447 NE2d 148, *cert den* 462 US 1112, 77 L Ed 2d 1341, 103 S Ct 2465, *reh den* 463 US 1236, 77 L Ed 2d 1452, 104 S Ct 31, *later proceeding* 107 Ill 2d 19, 88 Ill Dec 902, 479 NE2d 922, *later app* 132 Ill 2d 1, 138 Ill Dec 201, 547 NE2d 170, *cert den* (US) 110 L Ed 2d 652, 110 S Ct 2632; *Baysinger v State* (Ind App) 436 NE2d 96; *State v Myrick*, 228 Kan 406, 616 P2d 1066, *habeas corpus proceeding* (CA10 Kan) 799 F2d 642; *State v Brown*, 118 NJ 595, 573 A2d 886; *People v Flores* (2d Dept) 143 App Div 2d 840, 533 NYS2d 394; *Vowell v State* (Okla Crim) 728 P2d 854, *later proceeding* (Okla Crim) 732 P2d 905; *State v Tyson*, 72 Or App 140, 694 P2d 1003, *review den* 299 Or 37, 698 P2d 965; *State v Allen*, 266 SC 175, 222 SE2d 287 (*ovrld on other grounds by State v Rumsey*, 267 SC 236, 226 SE2d 894) as stated in *State v Thomas*, 267 SC 300, 227 SE2d 669 and *vacated* 432 US 902, 53 L Ed 2d 1074, 97 S Ct 2944; *State v Jenner* (SD) 434 NW2d 76; *Rajski v State* (Tex App Houston (14th Dist)) 715 SW2d 832 (*disapproved on other grounds by Rutledge v State* (Tex Crim) 749 SW2d 50, *motion for rehearing on PDR denied* (Apr 27, 1988)).

Annotations: Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245 § 6[a].

17. *United States v Louie* (SD NY) 625 F Supp 1327, *app dismd* (CA2 NY) 787 F2d 65.

both.¹⁸ And the fact that codefendant's counsel stated in his closing argument that defendant was more likely to have committed the murders at issue than codefendant was insufficient to establish the need for severance.¹⁹

On the other hand, the courts have held in other cases that an attempt to escape conviction by placing the guilt on a codefendant was a sufficient ground for severance.²⁰ Thus, for example, it has been held that the trial court's error in denying severance was prejudicial to defendant where the codefendant was the government's best witness against defendant and where, in his closing argument, the codefendant's counsel placed the blame on defendant and accused defendant of being a liar.²¹

Mere inconsistencies between defenses, however, will not suffice; they must be mutually exclusive and irreconcilable.²²

§ 173. Inconsistencies in defenses or trial strategies; necessity of irreconcilable conflict

The courts have generally indicated that mere inconsistencies in defenses or trial strategies not amounting to a conflict do not warrant separate trials on the ground of antagonistic defenses.²³ In fact, an increasing number of courts are holding that antagonistic defenses are sufficiently prejudicial to require

18. *People v Boyde*, 46 Cal 3d 212, 250 Cal Rptr 83, 758 P2d 25, motion gr, cert gr 490 US 1097, 104 L Ed 2d 1002, 109 S Ct 2447, motion gr (US) 107 L Ed 2d 348, 110 S Ct 361 and affd (US) 108 L Ed 2d 316, 110 S Ct 1190, reh den (US) 109 L Ed 2d 322, 110 S Ct 1961 and stay gr (Cal) 1990 Cal LEXIS 4051.

19. *People v Olinger*, 112 Ill 2d 324, 97 Ill Dec 772, 493 NE2d 579, cert den 479 US 1101, 94 L Ed 2d 180, 107 S Ct 1329, reh den 481 US 1025, 95 L Ed 2d 520, 107 S Ct 1914.

20. *United States v Romanello* (CA5 Tex) 726 F2d 173, reh den (CA5 Tex) 732 F2d 941; *Hill v State* (Ala App) 481 So 2d 419; *McDaniel v State*, 278 Ark 631, 648 SW2d 57, later app 283 Ark 352, 676 SW2d 732, later proceeding 286 Ark 246, 691 SW2d 153; *People v Byron*, 116 Ill 2d 81, 107 Ill Dec 192, 506 NE2d 1247; *State v Sauls* (Iowa) 356 NW2d 516, later app (Iowa) 391 NW2d 239; *State v Webb* (La) 424 So 2d 233; *Commonwealth v Moran*, 387 Mass 644, 442 NE2d 399; *People v Muhammad*, 170 Mich App 747, 428 NW2d 762, app den 432 Mich 888; *People v Rodriguez* (1st Dept) 91 App Div 2d 591, 457 NYS2d 268.

Annotations: 82 ALR3d 245 § 6[b].

21. *United States v Gonzalez* (CA11 Fla) 804 F2d 691, reh den, en banc (CA11 Fla) 818 F2d 871.

22. § 172.

23. *United States v Sherlock* (CA9 Ariz) 865 F2d 1069; *United States v Adler* (CA9 Wash) 862 F2d 210, rereported (CA9 Wash) 879 F2d 491; *Person v Miller* (CA4 NC) 854 F2d 656,

26 Fed Rules Evid Serv 1047, 96 ALR Fed 495, cert den 489 US 1011, 103 L Ed 2d 182, 109 S Ct 1119; *United States v Deveau* (CA5 Tex) 734 F2d 1023, CCH Fed Secur L Rep ¶ 91536, reh den (CA5 Tex) 738 F2d 437 and cert den 469 US 1158, 83 L Ed 2d 921, 105 S Ct 906; *United States v Jenkins* (CA2 Conn) 496 F2d 57, cert den 420 US 925, 43 L Ed 2d 394, 95 S Ct 1119 and cert den 420 US 925, 43 L Ed 2d 394, 95 S Ct 1119; *United States v Steinmetz* (MD Pa) 643 F Supp 537; *United States v Badalamenti* (SD NY) 663 F Supp 1542; *State v Smith*, 201 Conn 659, 519 A2d 26; *West v United States* (Dist Col App) 499 A2d 860; *Louis v State*, 185 Ga App 472, 364 SE2d 607; *People v Wolfe* (1st Dist) 144 Ill App 3d 843, 98 Ill Dec 548, 494 NE2d 670; *Blacknell v State* (Ind) 502 NE2d 899; *State v Van Pham*, 234 Kan 649, 675 P2d 848; *Commonwealth v Williams*, 399 Mass 60, 503 NE2d 1; *Henry v Minnesota Public Utilities Com.* (Minn) 379 NW2d 498.

Watergate defendant's defense that he had been misled by former president was not at requisite level of conflict with defenses of codefendants (who asserted that their contacts with president were lawful and proper in every respect) as to entitle defendant to severance on ground of inconsistent defenses. *United States v Haldeman*, 181 App DC 254, 559 F2d 31, 1 Fed Rules Evid Serv 1203, cert den 431 US 933, 53 L Ed 2d 250, 97 S Ct 2641, reh den 433 US 916, 53 L Ed 2d 1103, 97 S Ct 2992.

Annotations: Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245 § 10.

severance only when they are mutually exclusive²⁴ and irreconcilable.²⁵ In other words, the defendants must attempt to place the entire blame on each other, causing each to defend against the other as well as the state.²⁶ The jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the codefendant.²⁷ Where defendant's alleged innocence does not require the codefend-

24. *United States v Williams* (CA7 Ill) 858 F2d 1218, 26 Fed Rules Evid Serv 1365, cert den 488 US 1010, 102 L Ed 2d 787, 109 S Ct 796, later app (CA7 Ill) 904 F2d 7 and (disagreed with by multiple cases as stated in *United States v Miller* (CA7 Ill) 891 F2d 1265); *United States v Horton* (CA6 Mich) 847 F2d 313, 25 Fed Rules Evid Serv 1285, reh den (CA6) 1988 US App LEXIS 14062; *United States v Gonzalez* (CA11 Fla) 804 F2d 691, reh den, en banc (CA11 Fla) 818 F2d 871; *United States v Holcomb* (CA5 Tex) 797 F2d 1320 (diverged from by *United States v Edelman* (CA5 Tex) 873 F2d 791, 27 Fed Rules Evid Serv 985, reh den, en banc (CA5 Tex) 877 F2d 972); *United States v Carter* (CA11 Fla) 760 F2d 1568, 18 Fed Rules Evid Serv 108 (disagreed with on other grounds by *United States v Manganello* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063); *United States v Romanello* (CA5 Tex) 726 F2d 173, reh den (CA5 Tex) 732 F2d 941; *United States v Crawford* (CA5 Miss) 581 F2d 489; *United States v Wilson* (CA5 Tex) 500 F2d 715, cert den 420 US 977, 43 L Ed 2d 658, 95 S Ct 1403, post-conviction proceeding (CA5 Tex) 916 F2d 984, reh den, en banc (CA5 Tex) 925 F2d 827; *United States v Dynalectric Co.* (WD Ky) 674 F Supp 240, 1988-2 CCH Trade Cases ¶68238; *United States v Garcia Fernandez* (ED Pa) 658 F Supp 41, affd without op (CA3 Pa) 838 F2d 1206 and affd without op (CA3 Pa) 838 F2d 1207; *United States v Mandel* (DC Md) 415 F Supp 1033; *Herron v State* (Ala App) 481 So 2d 425, later app (Ala App) 513 So 2d 107; *Underwood v State* (Ind) 535 NE2d 507, cert den (US) 107 L Ed 2d 206, 110 S Ct 257, reh den (US) 107 L Ed 2d 524, 110 S Ct 524.

25. *United States v Tutino* (CA2 NY) 883 F2d 1125, 28 Fed Rules Evid Serv 466, cert den (US) 107 L Ed 2d 1044, 110 S Ct 1139; *Person v Miller* (CA4 NC) 854 F2d 656, 26 Fed Rules Evid Serv 1047, 96 ALR Fed 495, cert den 489 US 1011, 103 L Ed 2d 182, 109 S Ct 1119; *United States v Horton* (CA6 Mich) 847 F2d 313, 25 Fed Rules Evid Serv 1285, reh den (CA6) 1988 US App LEXIS 14062; *United States v Gonzalez* (CA11 Fla) 804 F2d 691, reh den, en banc (CA11 Fla) 818 F2d 871; *United States v Romanello* (CA5 Tex) 726 F2d 173, reh den (CA5 Tex) 732 F2d 941; *United States v Becker* (CA4 Md) 585 F2d 703, cert den 439 US 1080, 59 L Ed 2d 50, 99 S Ct 862; *United States v Beech-Nut Nutrition Corp.* (ED NY)

659 F Supp 1487, motion den (ED NY) 677 F Supp 117 and affd (CA2 NY) 871 F2d 1181, 27 Fed Rules Evid Serv 849, cert den (US) 107 L Ed 2d 314, 110 S Ct 324; *United States v Garcia Fernandez* (ED Pa) 658 F Supp 41, affd without op (CA3 Pa) 838 F2d 1206 and affd without op (CA3 Pa) 838 F2d 1207; *United States v Kelley* (ED Wis) 120 FRD 103; *Herron v State* (Ala App) 481 So 2d 425, later app (Ala App) 513 So 2d 107; *Lopez v State*, 29 Ark App 145, 778 SW2d 641; *Christian v United States* (Dist Col App) 394 A2d 1, cert den 442 US 944, 61 L Ed 2d 315, 99 S Ct 2889; *Commonwealth v Parker*, 402 Mass 333, 522 NE2d 924; *People v Campbell*, 121 Mich App 374, 328 NW2d 419; *State v Jenner* (SD) 434 NW2d 76.

26. *Roundtree v State* (Fla) 546 So 2d 1042, 14 FLW 337, companion case (Fla) 546 So 2d 1047, 14 FLW 348; *State v Prudhomme* (La App 3d Cir) 532 So 2d 234, cert den (La) 541 So 2d 871; *People v Muhammad*, 170 Mich App 747, 428 NW2d 762, app den 432 Mich 888.

In prosecution for aggravated rape, defendants did not show actual antagonism where each made confession which implicated himself and other defendant as principal and which were contradictory only as to the extent of involvement. *State v Conway* (La App 3d Cir) 556 So 2d 1323, companion case (La App 3d Cir) 556 So 2d 1331, cert den (La) 563 So 2d 876.

27. *State v Wussler*, 139 Ariz 428, 679 P2d 74.

Trial court did not abuse its discretion by refusing to grant severance despite defendants' claim that they were prejudiced by conflicts in their defenses and by fact that one defendant tried to shift culpability to others, where defenses were not irreconcilable so that jury was required to disbelieve core of one defense in order to believe core of other. *United States v Jones* (CA8 Mo) 880 F2d 55, 28 Fed Rules Evid Serv 829, reh den (CA8) 1989 US App LEXIS 12123 and reh den (CA8) 1989 US App LEXIS 13053.

Trial court in prosecution for murder properly denied severance, where alleged conflicts between codefendants did not go to essence of either's defense, jury could reasonably construct sequence of events that accommodated essence of each defense, conflicts subjected neither codefendant to prejudice, and trial

dant's conviction and the codefendant's alleged innocence does not require defendant's conviction, the necessity for a severance is not demonstrated.²⁸ And a defense of lack of knowledge is not necessarily inconsistent with and irreconcilable with the defenses of the codefendants.²⁹

§ 174. —Particular defenses as antagonistic; entrapment

In numerous cases the courts have considered whether particular defenses were mutually exclusive and irreconcilable, and in the vast majority of such cases they have found insufficient grounds for severance.³⁰ In particular, the entrapment defense has frequently been claimed to be antagonistic to a variety of defenses raised by codefendants, but the courts have rarely granted a severance to the movant on such grounds.³¹ An alibi defense which does not

court ameliorated whatever conflicts did arise. *Smith v Kelso* (CA11 Ga) 863 F2d 1564, cert den 490 US 1072, 104 L Ed 2d 644, 109 S Ct 2079.

Antagonistic defenses do not per se require severance, even if defendants are hostile or attempt to cast blame on each other, and antagonism of defenses requires severance only where defenses are so inconsistent that jury would have to believe one defendant at expense of other. *United States v Drougas* (CA1 Mass) 748 F2d 8, 16 Fed Rules Evid Serv 1002 (disagreed with on other grounds by *Cola v Reardon* (CA1 Mass) 787 F2d 681, cert den 479 US 930, 93 L Ed 2d 351, 107 S Ct 398) and (disagreed with on other grounds by *United States v Lau* (CA1 Puerto Rico) 828 F2d 871, 23 Fed Rules Evid Serv 881, cert den 486 US 1005, 100 L Ed 2d 194, 108 S Ct 1729).

28. *United States v Adler* (CA9 Wash) 879 F2d 491.

29. *United States v Kane* (CA5 Tex) 887 F2d 568, cert den (US) 107 L Ed 2d 1062, 110 S Ct 1159.

30. *United States v Sawyer* (CA11 Fla) 799 F2d 1494, cert den 479 US 1069, 93 L Ed 2d 1009, 107 S Ct 961 (each defendant attempted to minimize his participation in scheme and to shift blame to government's witness); *United States v Carter* (CA11 Fla) 760 F2d 1568, 18 Fed Rules Evid Serv 108 (disagreed with on other grounds by *United States v Manganellis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063) (alibi defense vs mere presence defense); *United States v Marable* (CA5 Ga) 574 F2d 224 (denial of any involvement vs no defense by codefendant); *United States v Swanson* (CA5 Ga) 572 F2d 523, cert den 439 US 849, 58 L Ed 2d 152, 99 S Ct 152 (noninvolvement vs lack of intent); *United States v Gonzalez* (SD NY) 698 F Supp 531 (mistaken identity vs mere presence on scene); *United States v Beech-Nut Nutrition Corp.* (ED NY) 659 F Supp 1487, motion den (ED NY) 677 F Supp 117 and affd (CA2 NY) 871 F2d 1181, 27 Fed Rules Evid Serv 849, cert den (US) 107 L Ed

2d 314, 110 S Ct 324 (lack of knowledge vs lack of intent to defraud).

31. *United States v Lara* (CA8 Minn) 891 F2d 669; *United States v Tutino* (CA2 NY) 883 F2d 1125, 28 Fed Rules Evid Serv 466, cert den (US) 107 L Ed 2d 1044, 110 S Ct 1139 (not indicated); *United States v Williams* (CA7 Ill) 858 F2d 1218, 26 Fed Rules Evid Serv 1365, cert den 488 US 1010, 102 L Ed 2d 787, 109 S Ct 796, later app (CA7 Ill) 904 F2d 7 and (disagreed with by multiple cases as stated in *United States v Miller* (CA7 Ill) 891 F2d 1265) (noninvolvement in conspiracy); *United States v Kaufman* (CA5 Tex) 858 F2d 994, 26 Fed Rules Evid Serv 1459, reh den (CA5 Tex) 874 F2d 242 (disagreed with on other grounds by *Leighnor v Turner* (CA8 Mo) 884 F2d 385) and (disagreed with on other grounds by *United States v Hallman* (App DC) 923 F2d 873) (innocence); *United States v Esch* (CA10 Colo) 832 F2d 531, 24 Fed Rules Evid Serv 146, cert den 485 US 908, 99 L Ed 2d 242, 108 S Ct 1084 and cert den 485 US 991, 99 L Ed 2d 509, 108 S Ct 1299 (lack of intent); *United States v Moschiano* (CA7 Ill) 695 F2d 236, 12 Fed Rules Evid Serv 124, cert den 464 US 831, 78 L Ed 2d 111, 104 S Ct 110 and (disagreed with by multiple cases as stated in *United States v Watson*, 282 App DC 305, 894 F2d 1345, 29 Fed Rules Evid Serv 1201) (unwitting accomplice); *United States v Babbitt* (CA1 RI) 683 F2d 21, 11 Fed Rules Evid Serv 268 (denying everything and putting government to proof); *United States v Lentz* (CA5 Tex) 624 F2d 1280, 6 Fed Rules Evid Serv 961, reh den (CA5 Tex) 632 F2d 894 and cert den 450 US 995, 68 L Ed 2d 194, 101 S Ct 1696 (not stated); *United States v Morrow* (CA5 Fla) 537 F2d 120, reh den (CA5 Fla) 541 F2d 282 and cert den 430 US 956, 51 L Ed 2d 806, 97 S Ct 1602 and cert den 430 US 956, 51 L Ed 2d 806, 97 S Ct 1602 (defense of nonparticipation in conspiracy); *Herrera v State* (Fla App D3) 532 So 2d 54, 13 FLW 2305 (both defendants claiming entrapment); *Commonwealth v Davis*, 388 Pa Super 224, 565 A2d 458, app den (Pa) 575 A2d 561 (prosecution

raise any points in substantive conflict with codefendant's defense is not antagonistic.³² Nor are an alibi defense and a claim of acting under duress sufficiently in conflict by themselves to sway the jury to find one defendant guilty, there being enough independent evidence of defendant's guilt to support a conviction.³³ Even identical alibi defenses by both defendants are not antagonistic.³⁴

§ 175. Comment on one defendant's failure to testify, by counsel for other defendant

Motions for separate trials have often been grounded on the inability, on a joint trial, of counsel for one defendant to comment on the failure of the other defendant to testify. Such motions have usually been denied,³⁵ although in the oft-cited and discussed *De Luna* case³⁶ the position was taken that if there was a duty on counsel for a codefendant to comment on the failure of the accused to take the stand and the interests of the accused and the codefendant were conflicting, separate trials should be granted.³⁷

for homicide by vehicle, in which each defendant claimed not to have been driving at time of collision in which deaths occurred; held not irreconcilable defenses where there was third person in car; *State v Alcorn* (Tenn Crim) 741 SW2d 135, post-conviction proceeding (Tenn Crim) 1990 Tenn Crim App LEXIS 734 (lack of interest in drug transaction).

Contention that entrapment defense of codefendant was so antagonistic to other codefendants' positions that they did not get fair trial was not established where it was apparent from cross-examination of first witness to take stand that codefendant was presenting entrapment defense and where other codefendants asserted no defense, therefore presenting no "defenses" which were inconsistent with that of codefendant. *United States v Dohm* (CA5 Fla) 597 F2d 535, on reh (CA5 Fla) 618 F2d 1169.

The trial court did not abuse its discretion in denying accused's motion for severance where the five defendants were properly joined under FRCrP 8(b) although two of the defendants relied on the defense of entrapment and the testimony of one codefendant was inculpatory. *United States v Ellsworth* (CA9 Cal) 481 F2d 864, cert den 414 US 1041, 38 L Ed 2d 332, 94 S Ct 544.

32. *United States v Manner* (App DC) 887 F2d 317, 29 Fed Rules Evid Serv 73, cert den (US) 107 L Ed 2d 962, 110 S Ct 879 and on remand (DC Dist Col) 1990 US Dist LEXIS 5894, affd (App DC) 1990 US App LEXIS 15459.

33. *Lemon v United States* (Dist Col App) 564 A2d 1368.

34. *People v Atkins* (1st Dist) 161 Ill App' 3d 600, 113 Ill Dec 463, 515 NE2d 272, app den (Ill) 117 Ill Dec 227, 520 NE2d 388.

35. *United States v Marquez* (CA2 NY) 449

F2d 89, cert den 405 US 963, 31 L Ed 2d 239, 92 S Ct 1167 and cert den 405 US 963, 31 L Ed 2d 239, 92 S Ct 1173; *Gurleski v United States* (CA5 Tex) 405 F2d 253, cert den 395 US 981, 23 L Ed 2d 769, 89 S Ct 2140 and (superseded by statute on other grounds as stated in *Brown v Frey* (CA8 Mo) 889 F2d 159, 29 Fed Rules Evid Serv 118, petition den (CA8) 1989 US App LEXIS 18895 and cert den (US) 107 L Ed 2d 1059, 110 S Ct 1156); *Kolod v United States* (CA10 Colo) 371 F2d 983, vacated on other grounds 394 US 165, 22 L Ed 2d 176, 89 S Ct 961, reh den 394 US 939, 22 L Ed 2d 475, 89 S Ct 1177 and on remand (DC NJ) 318 F Supp 66, affd (CA3 NJ) 494 F2d 593, cert den 419 US 881, 42 L Ed 2d 121, 95 S Ct 147; *United States v Frumento* (ED Pa) 405 F Supp 23; *State v White*, 115 Ariz 199, 564 P2d 888.

Annotations: Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245 § 11.

36. *De Luna v United States* (CA5 Tex) 308 F2d 140, 1 ALR3d 969, reh den (CA5 Tex) 324 F2d 375 and (disagreed with by *United States v McClure* (CA10 NM) 734 F2d 484, 15 Fed Rules Evid Serv 1667) and (disagreed with by *United States v McKinney* (CA6 Ohio) 379 F2d 259 (disapproved by *Steagald v United States*, 451 US 204, 68 L Ed 2d 38, 101 S Ct 1642, on remand (CA5 Ga) 656 F2d 109, reh gr (CA5 Ga) 664 F2d 1241, on reh (CA5 Ga) 664 F2d 1242 and (not followed by *United States v Underwood* (CA9 Cal) 693 F2d 1306, op withdrawn (CA9) 704 F2d 1059))) as stated in *United States v Causey* (CA6 Mich) 834 F2d 1277, 24 Fed Rules Evid Serv 370, cert den 486 US 1034, 100 L Ed 2d 606, 108 S Ct 2019.

37. As indicating that the *De Luna* rule should not be followed, see *United States v Marquez* (SD NY) 319 F Supp 1016, stating that the rule

The *De Luna* decision was rendered in light of the factor of conflicting interests, or in light of the fact that the defenses of the accused and the codefendant were mutually exclusive, that is, if one defense was believed, the other could not be.³⁸ Thus, it has been noted that the key to the *De Luna* rule, when multiple defendants' rights are in conflict, is that the comments on the failure to testify must be an integral part of the defense and fundamentally antagonistic to the nontestifying defendant.³⁹ A number of later cases have held or recognized that the *De Luna*, or similar, rule is not applicable where the defenses of the defendants are not antagonistic.⁴⁰

The *De Luna* rule has also been said to be applicable only when there is a duty on counsel to comment, a mere desire to do so not being sufficient.⁴¹ And it has been stated that unless a defendant can show that his defense would probably benefit from commenting on a codefendant's refusal to testify, a denial of a motion to sever will not be prejudicial.⁴²

It has been held that the Fifth Amendment requires severance if defendant

had not found favor with those courts which have considered it.

38. See, for example, *United States v Kahn* (CA7 Ill) 381 F2d 824, cert den 389 US 1015, 19 L Ed 2d 661, 88 S Ct 591, reh den 392 US 948, 20 L Ed 2d 1413, 88 S Ct 2272 and cert den 389 US 1015, 19 L Ed 2d 661, 88 S Ct 592, reh den 392 US 948, 20 L Ed 2d 1414, 88 S Ct 2272.

39. *United States v Enten* (DC Dist Col) 332 F Supp 249.

40. *United States v Somers* (CA3 NJ) 496 F2d 723, cert den 419 US 832, 42 L Ed 2d 58, 95 S Ct 56 and cert den 419 US 832, 42 L Ed 2d 58, 95 S Ct 56 and cert den 419 US 832, 42 L Ed 2d 58, 95 S Ct 57; *United States v Wilson* (CA5 Tex) 451 F2d 209, cert den 405 US 1032, 31 L Ed 2d 490, 92 S Ct 1298; *United States v Battaglia* (CA7 Ill) 394 F2d 304, motion to vacate den (CA7 Ill) 394 F2d 327, vacated on other grounds 394 US 310, 22 L Ed 2d 297, 89 S Ct 1163, reh den 394 US 994, 22 L Ed 2d 771, 89 S Ct 1451 and on remand (SD Tex) 386 F Supp 926, later proceeding (CA5 Tex) 422 F2d 1330 and affd (CA5 Tex) 430 F2d 165, cert gr 400 US 990, 27 L Ed 2d 438, 91 S Ct 457 and revd 403 US 698, 29 L Ed 2d 810, 91 S Ct 2068, on remand (CA5 Tex) 446 F2d 1406 and on remand (ED Tenn) 307 F Supp 1129, affd (CA6) 437 F2d 11, cert den 402 US 988, 29 L Ed 2d 154, 91 S Ct 1664 and later app (CA7 Ill) 436 F2d 1243, cert den 400 US 1000, 27 L Ed 2d 451, 91 S Ct 455 and cert den 400 US 1000, 27 L Ed 2d 451, 91 S Ct 457 and on remand (CA10 Kan) 440 F2d 893, cert den 404 US 871, 30 L Ed 2d 114, 92 S Ct 60 and on remand (CA2 NY) 440 F2d 1337 and later app (CA7 Ill) 432 F2d 1115, cert den 401 US 924, 27 L Ed 2d 828, 91 S Ct

883; *United States v Frumento* (ED Pa) 405 F Supp 23; *United States v Mitchell* (DC Dist Col) 397 F Supp 166, affd 181 App DC 254, 559 F2d 31, 1 Fed Rules Evid Serv 1203, cert den 431 US 933, 53 L Ed 2d 250, 97 S Ct 2641, reh den 433 US 916, 53 L Ed 2d 1103, 97 S Ct 2992; *United States v Buschman* (ED Wis) 386 F Supp 822, affd (CA7 Wis) 527 F2d 1082; *United States v Garrison* (ED La) 348 F Supp 1112; *United States v Montague* (ND Miss) 326 F Supp 911; *United States v Kaufman* (SD NY) 291 F Supp 451; *United States v Smith* (ND Ga) 65 FRD 464.

41. *Gurleski v United States* (CA5 Tex) 405 F2d 253, cert den 395 US 981, 23 L Ed 2d 769, 89 S Ct 2140 and (superseded by statute on other grounds as stated in *Brown v Frey* (CA8 Mo) 889 F2d 159, 29 Fed Rules Evid Serv 118, petition den (CA8) 1989 US App LEXIS 18895 and cert den (US) 107 L Ed 2d 1059, 110 S Ct 1156).

Under no circumstances can it be said that defendant's attorney is obligated to comment upon codefendant's failure to testify; thus, trial court's prohibition of comment upon codefendant's failure to testify did not interfere with defendant's Sixth Amendment rights and constitute actual prejudice requiring severance, and defendant's attorney's comment in closing argument praising defendant's decision to testify did not prejudice codefendant. *United States v McClure* (CA10 NM) 734 F2d 484, 15 Fed Rules Evid Serv 1667.

42. *United States v De La Cruz Bellinger* (CA9 Cal) 422 F2d 723, cert den 398 US 942, 26 L Ed 2d 278, 90 S Ct 1860 and (disagreed with on other grounds by *United States v McClure* (CA10 NM) 734 F2d 484, 15 Fed Rules Evid Serv 1667).

exercises his privilege against self-incrimination and codefendant's attorney makes prejudicial comments about his privileged silence.⁴³

C. PROCEDURE [§§ 176–179]

§ 176. Moving party; court acting sua sponte

When two or more persons are jointly indicted, a severance may be had at the instance of the prosecution,⁴⁴ even against the objection of the defendants,⁴⁵ as well as upon the motion or application of a defendant.⁴⁶ Indeed, the trial court may order separate trials on its own motion,⁴⁷ since it has a continuing duty during all stages of the trial to grant a severance if it becomes clear that continued joinder will result in undue prejudice to the defendant.⁴⁸ However, some jurisdictions disagree,⁴⁹ holding that the trial court has no obligation to order severance sua sponte.⁵⁰

■■■■ *Observation:* The cases are in disagreement as to whether the court may sever the trial in favor of a nonmoving defendant.⁵¹

§ 177. Time of demand for severance

A defendant seeking a separate trial should generally demand it prior to commencement of the trial.⁵² Such motion comes too late when made after the

43. *United States v Aguiar* (CA5 Fla) 610 F2d 1296, reh den (CA5 Fla) 614 F2d 1299 and cert den 449 US 827, 66 L Ed 2d 31, 101 S Ct 91.

44. *United States v Marren* (SD Ill) 720 F Supp 735, affd without op (CA7 Ill) 915 F2d 1575, withdrawn, reported in full (CA7 Ill) 919 F2d 61.

45. *Campbell v Commonwealth*, 201 Va 507, 112 SE2d 155; *State ex rel. Zirk v Muntzing*, 146 W Va 349, 120 SE2d 260.

46. **Forms:** Motion, supporting affidavit, and order for severance. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 251, 252; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Forms 114 et seq.

Practice References: Motion for severance—Drafting moving papers. 5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases § 56.

47. *Smith v Kelso* (CA11 Ga) 863 F2d 1564, cert den 490 US 1072, 104 L Ed 2d 644, 109 S Ct 2079; *Bradley v State* (Del Sup) 559 A2d 1234; *Thompson v State*, 231 Miss 624, 97 So 2d 227.

48. § 158.

49. *People v Anderson*, 166 Mich App 455, 421 NW2d 200, app den 432 Mich 858.

50. *People v Patino* (2nd Dist) 95 Cal App 3d 11, 156 Cal Rptr 815; *People v Jones* (1st Dist) 82 Ill App 3d 386, 37 Ill Dec 744, 402 NE2d 746; *Smith v State* (Ind) 516 NE2d 1055, cert

den 488 US 934, 102 L Ed 2d 347, 109 S Ct 330.

51. As holding that the court may sever, see *United States v Odom* (CA4 Md) 888 F2d 1014, reh den, en banc (CA4) 895 F2d 928 and reh den, en banc (CA4) 1990 US App LEXIS 2682, cert den (US) 112 L Ed 2d 21, 111 S Ct 44; for a contrary holding, see *Brand v State*, 258 Ga 378, 369 SE2d 896.

52. *People v Hall* (1st Dist) 164 Ill App 3d 770, 115 Ill Dec 750, 518 NE2d 275, app den 121 Ill 2d 576, 122 Ill Dec 442, 526 NE2d 835 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174 and (disapproved on other grounds by *People v Adams*, 131 Ill 2d 387, 137 Ill Dec 616, 546 NE2d 561) as stated in *People v Jones* (1st Dist) 196 Ill App 3d 937, 143 Ill Dec 581, 554 NE2d 516, app den (Ill) 149 Ill Dec 330, 561 NE2d 700; *Townsend v State* (Ind) 533 NE2d 1215, cert den (US) 108 L Ed 2d 502, 110 S Ct 1327 and cert den (US) 110 L Ed 2d 653, 110 S Ct 2633, reh den (US) 111 L Ed 2d 824, 111 S Ct 9; *Raspberry v State* (Tex App Fort Worth) 741 SW2d 191, petition for discretionary review ref (Mar 3, 1988) and motion for rehearing on PDR denied (Apr 6, 1988) and petition for discretionary review ref (Dec 14, 1988).

■■■■ *Recommendation:* It has been suggested that application for severance should be made at the time the court assigns a trial date. 5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases § 55 (Motion for severance—Timing of motion).

As to commencement of trial generally, see § 4.

jury has been sworn, or after exercising the right of challenge, or even after commencing the impanelment of the jury, at least in the absence of a showing that something affording a basis for a separate trial came to the defendant's knowledge after such time.⁵³ Motions filed on the eve of the trial,⁵⁴ after commencement of trial,⁵⁵ after the government has concluded its opening statement,⁵⁶ after the codefendant takes the stand to testify,⁵⁷ after completion of the government's case-in-chief,⁵⁸ or after all evidence has been presented and immediately prior to beginning of closing argument,⁵⁹ have been held to be untimely.⁶⁰ However, the motion may be made before or at the close of all the evidence if it is based on a ground not previously known.⁶¹

Observation: Some statutes or rules require that a motion for severance be filed a specified number of days prior to trial,⁶² or prior to the announcement of readiness for trial.⁶³

The court may consider timeliness in deciding whether to grant or deny a severance motion.⁶⁴

§ 178. Waiver of right to severance

It is generally held that the right to severance is waived by failure to make a

53. *People v Stadnick* (2nd Dist) 207 Cal App 2d 767, 25 Cal Rptr 30, 99 ALR2d 766.

Defendants may be held to have waived their right by not making their motion for severance until after the *voire dire* had commenced, where they could not have been surprised by the type of evidence the government intended to produce. *United States v Moreno Morales* (CA1 Puerto Rico) 815 F2d 725, 22 Fed Rules Evid Serv 1063, cert den 484 US 966, 98 L Ed 2d 397, 108 S Ct 458.

54. *United States v Casamayor* (CA11 Fla) 837 F2d 1509, 24 Fed Rules Evid Serv 1001, cert den 488 US 1017, 102 L Ed 2d 803, 109 S Ct 813.

55. *People v Bull* (4th Dept) 136 App Div 2d 929, 524 NYS2d 909, app den 71 NY2d 966, 529 NYS2d 78, 524 NE2d 432; *Raspberry v State* (Tex App Fort Worth) 741 SW2d 191, petition for discretionary review ref (Mar 3, 1988) and motion for rehearing on PDR denied (Apr 6, 1988) and petition for discretionary review ref (Dec 14, 1988).

56. *United States v Adler* (CA9 Wash) 879 F2d 491.

57. *Commonwealth v Doa*, 381 Pa Super 181, 553 A2d 416.

58. *United States v Pinelli* (CA10 Colo) 890 F2d 1461, cert den (US) 108 L Ed 2d 632, 110 S Ct 1498 and cert den (US) 109 L Ed 2d 750, 110 S Ct 2568.

59. *Smith v State*, 155 Ga App 657, 272 SE2d 522.

60. A defendant may not make a tactical choice in the conduct of his trial as a joint trial with his codefendant and then, when dissatis-

fied with the results of his choice, make a different choice by moving for a severance at the close of the state's case. *State v Ryan*, 233 Neb 74, 444 NW2d 610, later proceeding 233 Neb 151, 444 NW2d 656 and stay gr (US) 58 USLW 3739 and cert den (US) 112 L Ed 2d 176, 111 S Ct 216.

61. *Townsend v State* (Ind) 533 NE2d 1215, cert den (US) 108 L Ed 2d 502, 110 S Ct 1327 and cert den (US) 110 L Ed 2d 653, 110 S Ct 2633, reh den (US) 111 L Ed 2d 824, 111 S Ct 9; *Commonwealth v Williams*, 399 Mass 60, 503 NE2d 1. See also *Crum v State* (Fla) 398 So 2d 810 (holding that the trial court committed reversible error in denying defendant's motion for severance on the ground that it was untimely, where the motion was made at the opening of trial for presentation of opening statements, and where the motion was based on facts which were not known before trial, namely, that the codefendant would accuse defendant of being solely responsible for the murder for which both were charged).

62. *State v Chindgren* (Utah App) 777 P2d 527, 113 Utah Adv Rep 42, holding that a motion to sever filed on the morning of trial was untimely.

63. *Raspberry v State* (Tex App Fort Worth) 741 SW2d 191, petition for discretionary review ref (Mar 3, 1988) and motion for rehearing on PDR denied (Apr 6, 1988) and petition for discretionary review ref (Dec 14, 1988).

64. *United States v Adler* (CA9 Wash) 879 F2d 491.

The court is not required to sever where the motion is untimely. *People v Johnson* (4th Dept) 124 App Div 2d 1063, 508 NYS2d 728.

motion for such severance at the appropriate time⁶⁵ in the trial court,⁶⁶ or by failure to join in a codefendant's motion.⁶⁷

The right is also waived by failure to renew the motion at or before the close of all the evidence.⁶⁸ However, the renewal requirement is not an inflexible one, and a denied motion will be preserved for appeal where the motion accompanies the introduction of evidence deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality⁶⁹ or a futile exercise.⁷⁰

■■■ Observation: A timely renewed motion enables the trial court to assess whether a joinder is prejudicial at a time when the evidence is fully developed, the parties are best prepared, and the witnesses' recollections freshest. Moreover, without a renewal requirement, a defendant could deliberately fail to make a meritorious motion and wait to see what verdict the jury returns without undue fear of a guilty verdict. Such a strategy runs contrary to the very purpose underlying joinder, which is fair and efficient judicial administration.⁷¹

65. *Townsend v State* (Ind) 533 NE2d 1215, cert den (US) 108 L Ed 2d 502, 110 S Ct 1327 and cert den (US) 110 L Ed 2d 653, 110 S Ct 2633, reh den (US) 111 L Ed 2d 824, 111 S Ct 9; *State v Crocker* (La App 1st Cir) 551 So 2d 707; *State v Jones* (La App 4th Cir) 537 So 2d 1244.

As to the timeliness or untimeliness of motions filed at various points during the proceedings, see § 177.

66. *United States v Killip* (CA10 Okla) 819 F2d 1542, cert den 484 US 865, 98 L Ed 2d 139, 108 S Ct 186, post-conviction proceeding (CA10 Okla) 856 F2d 1471 and cert den 484 US 987, 98 L Ed 2d 504, 108 S Ct 505.

67. *People v Miranda*, 44 Cal 3d 57, 241 Cal Rptr 594, 744 P2d 1127, cert den 486 US 1038, 100 L Ed 2d 613, 108 S Ct 2026, reh den 487 US 1246, 101 L Ed 2d 956, 109 S Ct 4 and stay gr (Cal) 1988 Cal LEXIS 1569 and (diverged from on other grounds by *People v Marshall*, 50 Cal 3d 907, 269 Cal Rptr 269, 790 P2d 676, reh den (Cal) 1990 Cal LEXIS 3057 and stay gr (Cal) 1990 Cal LEXIS 4393 and cert den (US) 112 L Ed 2d 1105, 111 S Ct 1023, reh den (US) 59 USLW 3703).

If a codefendant does not make a motion for a separate trial, he must assume the burden of convincing the appellate court that the trial court committed an abuse of discretion in not, sua sponte, ordering a separate trial for him. *People v Patino* (2nd Dist) 95 Cal App 3d 11, 156 Cal Rptr 815.

68. *United States v Smith* (CA9 Wash) 893 F2d 1573, 30 Fed Rules Evid Serv 142; *United States v Swift* (CA6 Mich) 809 F2d 320, 22 Fed Rules Evid Serv 571; *United States v Verdoorn* (CA8 Iowa) 528 F2d 103, 1 Fed Rules Evid Serv 1093; *State v Agubata*, 92 NC App 651, 375 SE2d 702; *State v Henderson*, 48 Wash

App 543, 740 P2d 329, review den 109 Wash 2d 1008.

The correct procedure is for defendant to renew his motion for severance at the close of the government's evidence or at the close of trial, and the trial court can then determine whether defendant was prejudiced by the misjoinder. *United States v Fernandez* (CA11 Fla) 892 F2d 976, 29 Fed Rules Evid Serv 209, cert den (US) 109 L Ed 2d 527, 110 S Ct 2201.

Motion for severance must be made both before trial and at close of prosecution's case-in-chief to preserve issue on appeal; otherwise, motion is considered waived on appeal. *United States v Yarbrough* (CA9 Wash) 852 F2d 1522, 26 Fed Rules Evid Serv 334, cert den 488 US 866, 102 L Ed 2d 140, 109 S Ct 171 and (disagreed with on other grounds by *United States v Pungitore* (CA3 Pa) 910 F2d 1084, 31 Fed Rules Evid Serv 115 (disagreed with by *United States v Felix* (CA10 Okla) 926 F2d 1522)).

69. *United States v Free* (CA9 Cal) 841 F2d 321, cert den 486 US 1046, 100 L Ed 2d 626, 108 S Ct 2042 and (disagreed with by multiple cases as stated in *United States v Davis* (CA9 Cal) 91 CDOS 2767, 91 Daily Journal DAR 4363), the Court holding, however, that trial court's comment that it was taking the motion under submission did not render renewal an "unnecessary formality."

70. *United States v Brown* (CA7 Wis) 870 F2d 1354 (holding that in this instance the trial court merely denied the motion with leave to refile, indicating that refile would not have been useless).

71. *United States v Free* (CA9 Cal) 841 F2d 321, cert den 486 US 1046, 100 L Ed 2d 626, 108 S Ct 2042 and (disagreed with by multiple

The right to move for a severance may also be lost by pretrial stipulation for a joint trial which amounts to an intentional abandonment of the right to separate trials.⁷²

The right to a separate trial for a capital offense granted by statute is not waivable by either party without the consent of the court, and the court may grant a waiver in such cases only for "good cause," which has been defined as "some operative factor not present in every case of joint indictment of defendants in capital cases."⁷³

§ 179. Motion and hearing on application for severance

A motion for severance of prosecution must be in writing⁷⁴ and set out the grounds for granting the severance; and the trial court passes upon the motion upon the grounds advanced at the time it was made.⁷⁵ The trial court, in acting on defendant's motion, must take into consideration the averments contained in the filed motion, arguments of defendant's counsel, and any other knowledge of the case developed from the proceedings to that point.⁷⁶

The motion or application must be supported by affidavits⁷⁷ or oral testimony, and may be controverted in the same way.⁷⁸ Defendant must allege more than mere apprehension of prejudice, and must establish how he would be prejudiced by a joint trial.⁷⁹ Motions for severance may properly be denied where such motions, or the affidavits submitted in support thereof, contain vague and conclusory assertions, lacking specificity.⁸⁰

cases as stated in *United States v Davis* (CA9 Cal) 91 CDOS 2767, 91 Daily Journal DAR 4363).

72. *Barbon-Zurita v State* (Fla App D3) 415 So 2d 824, later proceeding (Fla App D3) 471 So 2d 648.

73. *State v Brown* (Hamilton Co) 31 Ohio App 3d 86, 31 Ohio BR 128, 508 NE2d 1030.

74. *Commonwealth v Williams*, 399 Mass 60, 503 NE2d 1.

75. *People v Braune*, 363 Ill 551, 2 NE2d 839, 104 ALR 1513.

76. *People v Gibbons* (1st Dist) 149 Ill App 3d 37, 102 Ill Dec 624, 500 NE2d 517, app den (Ill) 106 Ill Dec 51, 505 NE2d 357 and cert den 483 US 1006, 97 L Ed 2d 737, 107 S Ct 3231; *People v Johnson* (3d Dist) 144 Ill App 3d 997, 99 Ill Dec 186, 495 NE2d 633.

In passing on a motion for severance, the trial court will give consideration and due weight to the pertinent factors including the feasibility of trying the defendants separately, the nature of the state's charge, and its evidence. *State v Jackson*, 43 NJ 148, 203 A2d 1, 11 ALR3d 841, cert den 379 US 982, 13 L Ed 2d 572, 85 S Ct 690.

77. *Commonwealth v Williams*, 399 Mass 60, 503 NE2d 1.

78. *State v Gee Jon*, 46 Nev 418, 211 P 676, 30 ALR 1443, reh den 46 Nev 438, 217 P 587, 30 ALR 1451.

79. *People v Smith* (1st Dist) 172 Ill App 3d 94, 122 Ill Dec 456, 526 NE2d 849; *People v Hall* (1st Dist) 164 Ill App 3d 770, 115 Ill Dec 750, 518 NE2d 275, app den 121 Ill 2d 576, 122 Ill Dec 442, 526 NE2d 835 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174 and (disapproved by *People v Adams*, 131 Ill 2d 387, 137 Ill Dec 616, 546 NE2d 561) as stated in *People v Jones* (1st Dist) 196 Ill App 3d 937, 143 Ill Dec 581, 554 NE2d 516, app den (Ill) 149 Ill Dec 330, 561 NE2d 700.

80. *United States v Gossett* (CA11 Fla) 877 F2d 901, 28 Fed Rules Evid Serv 826, cert den (US) 107 L Ed 2d 1045, 110 S Ct 1141; *United States v Bollinger* (CA11 Fla) 796 F2d 1394, reh den, op replaced, in part (CA11 Fla) 837 F2d 436, cert den 486 US 1009, 100 L Ed 2d 200, 108 S Ct 1737; *People v Lee* (3d Dist) 46 Ill App 3d 343, 4 Ill Dec 798, 360 NE2d 1173, 8 ALR4th 834 (unclear allegations); *State v Gee Jon*, 46 Nev 418, 211 P 676, 30 ALR 1443, reh den 46 Nev 438, 217 P 587, 30 ALR 1451.

Annotations: Right to severance where codefendant has incriminated himself, 54 ALR2d 830 § 14.

■■■■ **Reminder:** The motion should be on notice to the prosecutor, who will be given an opportunity to submit opposing affidavits.⁸¹

Numerous cases have held that the moving party bears the burden of clearly showing⁸² by convincing evidence⁸³ that justice requires a severance⁸⁴ because a joint trial would cause substantial prejudice⁸⁵ and denial of a fair trial.⁸⁶ The movant must also show that the various criteria for determining prejudice are applicable.⁸⁷ Defendant must make out a prima facie case for severance.⁸⁸ The unsworn allegations of defendant's attorney as to possible prejudice are not sufficient evidence to support the motion.⁸⁹

The trial court should grant a severance of trials for defendants jointly accused if it can be shown that the prosecution's insistence on a joint trial was not in good faith, or that it was solely for the purpose of obtaining an otherwise illegal delay, or to take unfair advantage of the defendants, or was not reasonably predicated on the purpose and intent of the statute which grants the right to try defendants jointly.⁹⁰

IV. CONDUCT OF TRIAL [§§ 180-320]

A. IN GENERAL [§§ 180-191]

Research References

ALR Digest to 3d, 4th, and Federal, Criminal Law §§ 101 et seq.; Trial §§ 1 et seq., §§ 2 et seq.

Index to Annotations, Docket and Calendar of Court; Evidence; Jury and Jury Trial; Trial

33 Federal Procedure, L Ed, Trial § 77:19

23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 1-27

3 Am Jur Trials 751, Tactics and Strategy of Pleading § 57; 5 Am Jur Trials 89, The Trial Brief; 14 Am Jur Trials 101, Glass Door Accidents § 50

Danner & Toothman, Trial Practice Checklists (1989) § 8:20

Hall, Professional Responsibility of the Criminal Lawyer (1987) § 16.2

Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) § 8:17

81. Practice References: Drafting severance motion paper. 5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases § 56.

82. United States v Troutman (CA10 NM) 814 F2d 1428, 22 Fed Rules Evid Serv 1020; Chancey v State, 256 Ga 415, 349 SE2d 717, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1954; People v Jackson, 158 Mich App 544, 405 NW2d 192, app den 428 Mich 917.

83. State v Parker (La App 5th Cir) 506 So 2d 675, cert den (La) 512 So 2d 456.

84. State v Porter (La App 3d Cir) 547 So 2d 736.

85. United States v Rojas (ED NY) 655, F Supp 1156; People v Jackson, 158 Mich App 544, 405 NW2d 192, app den 428 Mich 917.

A motion for separate trials must be supported by an affirmative showing of prejudice

to the substantial rights of the defendant. People v Anderson, 166 Mich App 455, 421 NW2d 200, app den 432 Mich 858.

86. United States v Rojas (ED NY) 655 F Supp 1156; Chancey v State, 256 Ga 415, 349 SE2d 717, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1954.

87. Causey v State, 192 Ga App 294, 384 SE2d 674.

88. United States v Ford, 276 App DC 315, 870 F2d 729.

89. Raspberry v State (Tex App Fort Worth) 741 SW2d 191, petition for discretionary review ref (Mar 3, 1988) and motion for rehearing on PDR denied (Apr 6, 1988) and petition for discretionary review ref (Dec 14, 1988).

90. People v Patino (2nd Dist) 95 Cal App 3d 11, 156 Cal Rptr 815.

§ 180. Generally

A court possesses the inherent power to control the conduct of the proceeding before it.⁹¹ This power exists apart from any statute or specific constitutional provision and springs from the creation of the very court itself; it is essential to the existence and meaningful functioning of the judicial tribunal.⁹² The judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.⁹³

■■■■ Observation: It has been stated that a criminal trial does not unfold like a play with actors following a script; there is no scenario and there can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process.⁹⁴

The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice.⁹⁵ The court has inherent power to take whatever legitimate steps are necessary to maintain proper decorum and

91. *Sheppard v Maxwell*, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media L R 1220; *Philadelphia & T.R. Co. v Stimpson*, 39 US 448, 10 L Ed 535; *Miami Herald Pub. Co. v Lewis (Fla)* 426 So 2d 1, 8 Media L R 2281; *State ex rel. Gore Newspapers Co. v Tyson (Fla App D4)* 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by *English v McCrary (Fla)* 348 So 2d 293, 2 Media L R 1903) as stated in *Miami Herald Pub. Co. v Lewis (Fla)* 426 So 2d 1, 8 Media L R 2281; *Hudson v State*, 108 Ga App 192, 132 SE2d 508, 100 ALR2d 1395; *State v Teegarden (Mo App)* 559 SW2d 618; *Gulf, C. & S. F.R. Co. v Smith (Okla)* 270 P2d 629; *Cody v State (Okla Crim)* 361 P2d 307, 84 ALR2d 997, later app (Okla Crim) 376 P2d 625; *Richards v Sicks' Rainier Brewing Co.*, 64 Wash 2d 357, 391 P2d 960, 2 ALR3d 430.

92. *Miami Herald Pub. Co. v Lewis (Fla)* 426 So 2d 1, 8 Media L R 2281; *State ex rel. Gore Newspapers Co. v Tyson (Fla App D4)* 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by *English v McCrary (Fla)* 348 So 2d 293, 2 Media L R 1903) as stated in *Miami Herald Pub. Co. v Lewis (Fla)* 426 So 2d 1, 8 Media L R 2281.

93. *Geders v United States*, 425 US 80, 47 L Ed 2d 592, 96 S Ct 1330; *Glasser v United States*, 315 US 60, 86 L Ed 680, 62 S Ct 457, reh den 315 US 827, 86 L Ed 1222, 62 S Ct 629 and reh den 315 US 827, 86 L Ed 1222, 62 S Ct 637 and (superseded by statute on other grounds as stated in *United States v Martorano (CA1 Mass)* 557 F2d 1, reh den (CA1 Mass) 561 F2d 406, 2 Fed Rules Evid Serv 275, cert den 435 US 922, 55 L Ed 2d 515, 98 S Ct 1484) and (superseded by statute on other grounds as stated in *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) and (superseded by statute as stated in *People*

v Montoya (Colo) 753 P2d 729); *Quercia v United States*, 289 US 466, 77 L Ed 1321, 53 S Ct 698; *De Luna v United States (CA5 Tex)* 308 F2d 140, 1 ALR3d 969, reh den (CA5 Tex) 324 F2d 375 and (disagreed with on other grounds by *United States v McClure (CA10 NM)* 734 F2d 484, 15 Fed Rules Evid Serv 1667) and (disagreed with on other grounds by *United States v McKinney (CA6 Ohio)* 379 F2d 259) as stated in *United States v Causey (CA6 Mich)* 834 F2d 1277, 24 Fed Rules Evid Serv 370, cert den 486 US 1034, 100 L Ed 2d 606, 108 S Ct 2019; *Scott v Spanjer Bros., Inc. (CA2 NY)* 298 F2d 928, 5 FR Serv 2d 226, 95 ALR2d 383; *Skelton v Beall (Fla App D3)* 133 So 2d 477, 94 ALR2d 820; *State v Furtick*, 147 SC 82, 144 SE 839, 84 ALR 1164.

94. *Geders v United States*, 425 US 80, 47 L Ed 2d 592, 96 S Ct 1330.

95. *Sheppard v Maxwell*, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media L R 1220; *Miami v Williams (Fla)* 40 So 2d 205; *Schroedl v McTague (Iowa)* 169 NW2d 860; *Calder v Levi*, 168 Md 260, 177 A 392, 97 ALR 880; *Jackson Yellow Cab Co. v Alexander*, 246 Miss 268, 148 So 2d 674; *State v James (Mo)* 321 SW2d 698; *Re Will of Hester*, 320 NC 738, 360 SE2d 801, reh den 321 NC 300, 362 SE2d 780; *Leake v Hagert (ND)* 175 NW2d 675 (superseded by statute on other grounds as stated in *State v Schimetz (ND)* 328 NW2d 808); *Frangos v Edmunds*, 179 Or 577, 173 P2d 596.

It is the duty of the trial court to see that the fundamental right of due process for both parties is not improperly denied. *Gage v Bozarth (Ind App)* 505 NE2d 64.

Courts have the inherent power, and indeed responsibility, so essential to the proper administration of justice to supervise the course of

appropriate atmosphere in the courtroom during a trial.⁹⁶ In discharging this duty, the court possesses broad discretionary powers sufficient to meet the circumstances of each case.⁹⁷

Practice guide: During the trial of a criminal case, the trial judge must keep in mind that his principal purpose is assuring fairness to both sides: The government, on the one hand, the defendant or defendants on the other. He must see to it that the trial is so conducted that the jurors, as triers of fact, are not distracted from their tasks; he must see to it that nothing occurs to impede the lawyers in their advocacy of the cause they represent; he must see that witnesses are accorded a full and complete opportunity to give their evidence; he must take steps to afford members of the press all avenues by which they can be present and hear so they can accurately report the proceedings; and finally, the trial judge must give those who come to the public's courtroom full opportunity to see and hear the judicial process as it unfolds during the trial, all of this in an orderly and dignified manner.⁹⁸

The court has the power to require that the proceeding be conducted with dignity,⁹⁹ and in an orderly and expeditious manner, and to control the

litigation before them. *Grisi v Shainswit* (1st Dept) 119 App Div 2d 418, 507 NYS2d 155.

A trial court's discretion must be exercised in a manner which comports with substantial justice because a trial is a search for the truth. *Great Plains Supply Co., Div. of Harvest States Cooperatives v Erickson* (ND) 398 NW2d 732.

96. *Miami v Williams* (Fla) 40 So 2d 205; *Jackson Yellow Cab Co. v Alexander*, 246 Miss 268, 148 So 2d 674; *Application of National Broadcasting Co.*, 64 NJ 476, 317 A2d 695; *State v Brown*, 19 NC App 480, 199 SE2d 134, app dismd 284 NC 255, 200 SE2d 659; *Stone v Reddix-Small*, 295 SC 514, 369 SE2d 840; *Wendelboe v Jacobson*, 10 Utah 2d 344, 353 P2d 178; *State v Schneider*, 158 Wash 504, 291 P 1093, 72 ALR 571.

In controlling the proceeding before it, it is within the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of the parties and witnesses and generally to further the administration of justice. *State ex rel. Gore Newspapers Co. v Tyson* (Fla App D4) 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by *English v McCrary* (Fla) 348 So 2d 293, 2 Media L R 1903) as stated in *Miami Herald Pub. Co. v Lewis* (Fla) 426 So 2d 1, 8 Media L R 2281; *Miami Herald Pub. Co. v Lewis* (Fla) 426 So 2d 1, 8 Media L R 2281.

As to the trial judge's rebuking bystanders, see § 252.

As to the trial judge's rebuking counsel, see §§ 159, 160, 713.

As to the trial judge's rebuking witnesses, see § 310.

97. *Di Lieto v Better Homes Insulation Co.*, 16 Conn App 100, 546 A2d 957; *Kwiechien v Gordon*, 33 Conn Supp 637, 365 A2d 118; *Duran v Neff* (Fla App D3) 366 So 2d 169; *Gage v Bozarth* (Ind App) 505 NE2d 64; *Tracy v Parish of Jefferson* (La App 5th Cir) 523 So 2d 266, cert den (La) 530 So 2d 569, reconsideration den (La) 532 So 2d 141; *Wiggins v State*, 315 Md 232, 554 A2d 356; *Bates v Detroit*, 66 Mich App 701, 239 NW2d 716; *Detwiler v Lowden*, 198 Minn 185, 269 NW 367, 107 ALR 1054, reh den 198 Minn 190, 269 NW 838, 107 ALR 1059 and (ovrld on other grounds by *Boyd v Grand T.W.R. Co.*, 338 US 263, 94 L Ed 55, 70 S Ct 26) and (ovrld on other grounds by *Hauenstein & Bermeister, Inc. v Met-Fab Industries, Inc.* (Minn) 320 NW2d 886); *Keesee v Freeman* (Mo App) 772 SW2d 663; *Santana v New York City Transit Authority*, 132 Misc 2d 777, 505 NYS2d 775; *Re Will of Hester*, 320 NC 738, 360 SE2d 801, reh den 321 NC 300, 362 SE2d 780; *Great Plains Supply Co., Div. of Harvest States Cooperatives v Erickson* (ND) 398 NW2d 732; *State v Robillard*, 146 Vt 623, 508 A2d 709, later app 147 Vt 484, 520 A2d 992.

Ordinarily the trial judge has extremely broad discretion to control courtroom activity, even when the restriction touches on matters protected by the First Amendment. *United States v Columbia Broadcasting System, Inc.* (CA5 Fla) 497 F2d 102, 1 Media L R 1351.

98. *United States v Torres* (ND Ill) 602 F Supp 1458, 11 Media L R 1661.

99. *Murray v Murray* (La App 2d Cir) 521 So 2d 754.

proceedings at the trial, so that justice is done.¹ This supervisory power encompasses the authority to structure the trial logically and to set the order of proof.² Trial courts must be afforded broad discretion to fashion orders to expedite cases consistent with the administration of justice and the efficient disposition of their case loads.³ A trial court has broad discretion to allow additional time for the arrival of a witness;⁴ to permit the reopening of a case for clarification of the record; and to sua sponte order a supplemental hearing for the taking of further evidence.⁵ In fact, when in the trial court's discretion the ends of justice so require, the rules of practice in conducting trials, including jury trials, may be relaxed.⁶

It is the responsibility of the trial judge to have the trial conducted in a manner that approaches an atmosphere of perfect impartiality.⁷

The discretion of a trial court in the overall direction of the trial ranges far but it is not infinite. Its reach stops when it is abused, and then the reviewing court will disturb it.⁸ A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner.⁹

■■■ Observation: The inherent power of the court to control the conduct

1. *Tracy v Parish of Jefferson* (La App 5th Cir) 523 So 2d 266, cert den (La) 530 So 2d 569, reconsideration den (La) 532 So 2d 141; *Murray v Murray* (La App 2d Cir) 521 So 2d 754.

2. *Re Will of Hester*, 320 NC 738, 360 SE2d 801, reh den 321 NC 300, 362 SE2d 780.

When there is a complete consolidation, the trial court has the discretion to determine which party proceeds first in conducting voir dire, striking the jury, giving the opening statements, examining witnesses, and presenting closing arguments. *Smith v Brownfield* (Ala) 553 So 2d 573.

Generally, the trial court may establish the procedure for presentation of a case in an unusual situation, absent an abuse of discretion. *Goswitz v Fiedler* (Minn App) 435 NW2d 857.

3. *Wahle v Medical Center of Delaware, Inc.* (Del Sup) 558 A2d 1228.

4. *Anderson v State Dept. of Human Resources* (Ala App) 553 So 2d 602, cert den (Ala) 1989 Ala LEXIS 967; *Great Plains Supply Co., Div. of Harvest States Cooperatives v Erickson* (ND) 398 NW2d 732.

5. *Great Plains Supply Co., Div. of Harvest States Cooperatives v Erickson* (ND) 398 NW2d 732.

6. *Estes v Texas*, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628, 1 Media L R 1187, reh den 382 US 875, 15 L Ed 2d 118, 86 S Ct 18 and (diverged from on other grounds by Chandler v Florida, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media L R 1041) as stated in *State v Hovey*, 106 NM 512, 742 P2d 512; *First Unitarian Soc. v Faulkner*, 91 US 415, 23 L Ed 283;

Pete v Henderson, 124 Cal App 2d 487, 269 P2d 78, 45 ALR2d 58.

7. *Estes v Texas*, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628, 1 Media L R 1187, reh den 382 US 875, 15 L Ed 2d 118, 86 S Ct 18 and (diverged from on other grounds by Chandler v Florida, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media L R 1041) as stated in *State v Hovey*, 106 NM 512, 742 P2d 512; *Di Lieto v Better Homes Insulation Co.*, 16 Conn App 100, 546 A2d 957; *Fitzpatrick v St. Louis, S.F.R. Co. (Mo)* 327 SW2d 801, 80 ALR2d 825; *State v Sorrels*, 33 NC App 374, 235 SE2d 70.

All courts must be free and independent from the occasion of political influence and no court should even be perceived to be biased in favor of local political authorities who pay the bills. *County of Allegheny v Commonwealth*, 517 Pa 65, 534 A2d 760.

Generally, as to the presiding judge's duty to remain fair and impartial, see § 272.

8. *Philadelphia & T.R. Co. v Stimpson*, 39 US 448, 10 L Ed 535; *Di Lieto v Better Homes Insulation Co.*, 16 Conn App 100, 546 A2d 957; *Wiggins v State*, 315 Md 232, 554 A2d 356; *Calder v Levi*, 168 Md 260, 177 A 392, 97 ALR 880; *Commonwealth v Coyne*, 228 Mass 269, 117 NE 337, 3 ALR 1209; *Keesee v Freeman* (Mo App) 772 SW2d 663; *Re Will of Hester*, 320 NC 738, 360 SE2d 801, reh den 321 NC 300, 362 SE2d 780; *Great Plains Supply Co., Div. of Harvest States Cooperatives v Erickson* (ND) 398 NW2d 732; *Hyre v Johnson*, 107 W Va 524, 149 SE 385, 64 ALR 1536.

9. *Great Plains Supply Co., Div. of Harvest States Cooperatives v Erickson* (ND) 398 NW2d 732.

of its own proceedings is not limited to criminal proceedings, although most of the pronouncements regarding the exercise of this power have been made in criminal cases.¹⁰

§ 181. —Under Uniform Rules of Criminal Procedure

Under the Uniform Rules of Criminal Procedure, unless the court for cause otherwise permits, the parties shall proceed with the trial in the following order:

- The prosecuting attorney shall make an opening statement;
- Counsel for the defendant or, if the defendant is proceeding without counsel or the court in its discretion permits, the defendant, may make an opening statement or may defer doing so until after the close of the state's case in chief;
- The state shall present its case in chief;
- The defendant may present a case in chief;
- The state and the defendant may present rebuttal evidence in successive rebuttals as required. The court for cause may permit a party to present evidence not of a rebuttal nature, but if the state is permitted to present further evidence in chief the defendant may respond with further evidence in chief;
- The prosecuting attorney may make a closing argument;
- Counsel for the defendant or, if the defendant is proceeding without counsel or the court in its discretion permits, the defendant, may make a closing argument.¹¹ The court may allow both sides to make further argument within limits it prescribes.¹² If there are two or more defendants and they do not agree as to their order of proceeding, the court shall determine their order of proceeding.¹³

§ 182. Time of trial

The trial court has inherent power to control its own docket to ensure that cases proceed before it in a timely and orderly fashion.¹⁴ The trial judge has broad discretion over the trial timetable.¹⁵

10. State ex rel. Gore Newspapers Co. v Tyson (Fla App D4) 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by English v McCrary (Fla) 348 So 2d 293, 2 Media L R 1903) as stated in Miami Herald Pub. Co. v Lewis (Fla) 426 So 2d 1, 8 Media L R 2281.

11. Unif R Crim P Rule 521(a).

12. Unif R Crim P Rule 521(b).

13. Unif R Crim P Rule 521(c).

14. Government of Virgin Islands v Scatliffe (DC VI) 580 F Supp 1482, affd without op (CA3 VI) 755 F2d 919; Maximum Technology v Superior Court (1st Dist) 188 Cal App 3d 935, 233 Cal Rptr 733, review gr, transf (Cal) 242 Cal Rptr 196, 745 P2d 917; Sparacello v Andrews (La App 1st Cir) 501 So 2d 269, cert den (La) 502 So 2d 103; Grisi v Shainswit (1st Dept) 119 App Div 2d 418, 507 NYS2d 155; Rupert v Home Mut. Ins. Co. (App) 138 Wis 2d 1, 405 NW2d 661.

■■■■ **Caution:** Rule 3.2 of the Rules of Professional Conduct requires lawyers to make reasonable efforts to expedite litigation consistent with the interests of the client. Dilatory conduct which frustrates the business of the court can be punished as contempt. Hall, Professional Responsibility of the Criminal Lawyer (1987) § 16.2.

Practice References: Obtaining preference on trial calendar. 3 Am Jur Trials 751, Tactics and Strategy of Pleading § 57.

Forms: Placement of cases on calendar and setting of trial dates. 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 1-27.

15. United States v Fox (CA2 NY) 788 F2d 905; United States v Bein (CA2 NY) 728 F2d 107, 14 Fed Rules Evid Serv 1805, cert den 469 US 837, 83 L Ed 2d 75, 105 S Ct 135.

It is within the sound discretion of the trial courts in considering the facts of each particu-

Practice guide: Counsel has a duty to make an accurate estimate, as nearly as possible, of the time which is required to try a case in order to assist the court in managing its dockets.¹⁶ To show abuse of that discretion, the complaining party must demonstrate arbitrary action substantially impairing the defense.¹⁷

In criminal cases, this discretion is subject to the rights of the accused to a speedy trial¹⁸ and to time to prepare for trial,¹⁹ and subject to statutes specifying the time within which criminal cases shall be tried.²⁰

While cases should generally be tried in the order in which they appear on the calendar, a court may in its discretion try a case out of the regular order, and such action will be upheld in the absence of an abuse of discretion.²¹ In setting its docket, the court should give some sort of priority to jail cases, as opposed to bail cases, as it must to cases involving serious crimes of great significance to the public interest. In both bail and jail cases priority should be given, among others to cases where there is a critical issue involving guilt or innocence, or the possible loss of witnesses to the prosecution or the defense.²²

Observation: A notice for trial can only be interpreted to mean that the styled action has been assigned to a designated judge, and will be heard in his designated courtroom, on the specified day and at the specified hour.²³ The assignment of a case is tantamount to an order of the court that the parties proceed to trial at the time set.²⁴

§ 183. Place of trial

As a general rule, a court or judge, required by statute to act officially at a

lar case to achieve the prompt and just resolution of those matters which present exceptional circumstances. *Green v Vogel* (2d Dept) 144 App Div 2d 66, 537 NYS2d 180.

Generally as to the time of holding court, see 20 Am Jur 2d, Courts §§ 42-50.

As to the conduct of judicial proceedings on Sundays and holidays, see 73 Am Jur 2d, Sundays and Holidays §§ 103 et seq.

16. *Re Marriage of Goellner* (Colo App) 770 P2d 1387.

17. *United States v Fox* (CA2 NY) 788 F2d 905; *United States v Bein* (CA2 NY) 728 F2d 107, 14 Fed Rules Evid Serv 1805, cert den 469 US 837, 83 L Ed 2d 75, 105 S Ct 135.

A court which set trial of a cause of action for 11 a.m. lacked the discretion to hear the case at 9:30 a.m. on that day. *Rogers v Texas Commerce Bank-Reagan* (Tex) 755 SW2d 83, reh'g of cause overr (Sep 14, 1988).

18. 21A Am Jur 2d, Criminal Law §§ 652 et seq. §§ 849 et seq.

19. 21A Am Jur 2d, Criminal Law § 839.

As to brevity of time between assignment of counsel and trial, see 21A Am Jur 2d, Criminal Law § 981.

20. 21A Am Jur 2d, Criminal Law §§ 660-662, 854, 855.

21. *United States Shipping Board Merchant Fleet Corp. v Rhodes*, 297 US 383, 80 L Ed 733, 56 S Ct 517; *Ex parte Robinson*, 86 US 513, 22 L Ed 205; *Burdick v Mann*, 60 ND 710, 236 NW 340, 82 ALR 1443; *Commonwealth v Hare*, 2 Pa D & C2d 726.

Some state codes provide that cases on the criminal docket "shall" be called in the order in which they stand on the docket or otherwise in the sound discretion of the court; however, such a provision has been held to be directory and not mandatory. *Williams v State*, 188 Ga App 496, 373 SE2d 281.

22. *People v Kelly*, 38 NY2d 633, 382 NYS2d 1, 345 NE2d 544.

23. *Home Owners Warranty Corp. v Pine-wood Builders, Inc.*, 188 Ga App 324, 373 SE2d 34.

24. *Durso v Misiorek*, 9 Conn App 93, 516 A2d 450.

certain place, may not perform that act elsewhere.²⁵ If the place of holding court is left to the election of the judge he may lawfully sit in judgment where he pleases within the territorial limits prescribed as his jurisdiction.²⁶ In federal courts, the fixing of the place of trial within the district is within the discretion of the trial judge.²⁷

There are many factors which enter into particular cases making it necessary, or at least expedient, to conduct a trial or to conduct hearings at places other than those prescribed, and the courts generally agree that an emergency will justify holding court in some convenient place other than the courtroom.²⁸

§ 184. Arrangements in courtroom

The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel; it is designed to protect the witness and the jury from any distractions, intrusions, or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury.²⁹ Consequently, spectators should not be permitted within the space within the bar immediately around the judge, the jury, and the witnesses,³⁰ and neither should

25. *Kirkland v Archbold* (App, Cuyahoga Co) 68 Ohio L Abs 481, 113 NE2d 496.

As to the discharge on habeas corpus in the case of holding court at an unauthorized place, see 39 Am Jur 2d, Habeas Corpus § 52.

26. 20 Am Jur 2d, Courts §§ 36-41.

27. *Government of Virgin Islands v Scatliffe* (DC VI) 580 F Supp 1482, affd without op (CA3 VI) 755 F2d 919.

28. *United States v Addonizio* (CA3 NJ) 451 F2d 49, cert den 405 US 936, 30 L Ed 2d 812, 92 S Ct 949, reh den 405 US 1048, 31 L Ed 2d 501, 92 S Ct 1309; *State v Martin*, 107 Ariz 444, 489 P2d 254; *Warren v State*, 241 Ark 264, 407 SW2d 724; *Hamblin v Superior Court of Los Angeles County*, 195 Cal 364, 233 P 337, 43 ALR 1509; *People v Braun* (1st Dist) 29 Cal App 3d 949, 106 Cal Rptr 56, cert den 414 US 974, 38 L Ed 2d 217, 94 S Ct 294; *People v Maxey* (1st Dist) 28 Cal App 3d 190, 104 Cal Rptr 466; *Schnabel v Waters*, 37 Colo App 498, 549 P2d 795; *Costa v Reed*, 113 Conn 377, 155 A 417; *Futch v State* (Fla App D3) 223 So 2d 756; *Davis v State*, 240 Ga 763, 243 SE2d 12, later app 242 Ga 901, 252 SE2d 443, vacated, in part on other grounds 446 US 961, 64 L Ed 2d 819, 100 S Ct 2934, on remand 246 Ga 432, 271 SE2d 828, cert den 451 US 921, 68 L Ed 2d 312, 101 S Ct 2000, reh den 452 US 910, 69 L Ed 2d 413, 101 S Ct 3042 and reh den 452 US 932, 69 L Ed 2d 433, 101 S Ct 3069 and reh den 452 US 932, 69 L Ed 2d 433, 101 S Ct 3069; *Dahnke v People*, 168 Ill 102, 48 NE 137; *State v Jones* (Iowa) 281 NW2d 13; *State v Canova* (La App 4th Cir) 541 So 2d 273; *Commonwealth v De Brosky*, 363 Mass 718, 297 NE2d 496; *Bates v*

Detroit, 66 Mich App 701, 239 NW2d 716; *Jones v State*, 168 Miss 702, 152 So 479; *State ex rel. Green v James*, 355 Mo 223, 195 SW2d 669; *Smith v State*, 79 NM 450, 444 P2d 961; *People v Knapp* (3d Dept) 113 App Div 2d 154, 495 NYS2d 985, cert den 479 US 844, 93 L Ed 2d 97, 107 S Ct 158; *Howard v Commonwealth*, 6 Va App 132, 367 SE2d 527; *Selleck v Janesville*, 100 Wis 157, 75 NW 975.

The trial court did not err in moving the trial temporarily to a hospital to take the testimony of a shooting victim where the hospital room itself was an auditorium set up to resemble an actual courtroom, jurors entered from a special elevator that went directly to the auditorium, and thus they were not exposed to other hospital rooms, and the only possible prejudicial effect was that the jurors knew they were physically present in a hospital. *People v Jenkins* (1st Dist) 88 Ill App 3d 719, 44 Ill Dec 53, 410 NE2d 1145.

As to new trial on the ground that the trial was held partly outside of the courthouse, see 58 Am Jur 2d, New Trial § 96.

Annotations: Place of holding sessions of trial court as affecting validity of its proceeding, 18 ALR3d 572 § 4.

29. *Sheppard v Maxwell*, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media L R 1220; *State v Biehoffer*, 269 Minn 35, 129 NW2d 918.

30. *People v Fleming*, 166 Cal 357, 136 P 291; *State v Langley*, 214 Or 445, 315 P2d 560; *State v Weldon*, 91 SC 29, 74 SE 43 (ovrld on other grounds by *State v Thompson*, 122 SC 407, 115 SE 326).

members of the press,³¹ although it has been held not to be an abuse of discretion to deny a new trial when the victim's immediate family have sat within the bar of the court.³²

The trial court can require any counsel to remain behind the counsel table at all times.³³

Generally, the accused is permitted to sit with his counsel if he desires.³⁴ Party litigants are generally allowed to sit at the counsel table, unless they are so numerous as to interfere with the orderly conduct of the trial.³⁵

§ 185. —Seating of nonparty at counsel's table

Allowing a key witness, an expert witness, or some other person with whom counsel might need to confer during the conduct of the trial, to sit at the counsel's table, is generally held permissible in the discretion of the trial judge.³⁶ Thus, courts have allowed the employee of a party,³⁷ federal government agents,³⁸ state or local government agents,³⁹ the victim of the crime,⁴⁰ an

31. *Sheppard v Maxwell*, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media L R 1220.

32. *Howard v State*, 273 Ala 544, 142 So 2d 685; *Lehr v State* (Ala App) 398 So 2d 791.

33. *State v Jessup*, 31 Wash App 304, 641 P2d 1185.

34. *Blackwell v Wolff* (CA8 Neb) 454 F2d 48 (citing the ABA Standards, Trial by Jury § 4.1, for proposition that the defendant should be seated so as to be able to effectively consult with counsel); *People v Zammora*, 66 Cal App 2d 166, 152 P2d 180.

As to the right of consultation with counsel during trial, see 21A Am Jur 2d, Criminal Law §§ 737, 970.

As to the accused's right to confront witnesses, see 21A Am Jur 2d, Criminal Law §§ 720, 956.

As to the right of confrontation as including the right to see and hear witnesses, see 21A Am Jur 2d, Criminal Law § 959.

Annotations: Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 ALR3d 1360 § 9.

35. *Patton v Avis Rent-A-Car Systems, Inc.*, 44 Mich App 556, 205 NW2d 615.

36. *State v Fields* (La) 342 So 2d 624, 87 ALR3d 229; *Patton v Avis Rent-A-Car Systems, Inc.*, 44 Mich App 556, 205 NW2d 615.

As to the propriety of allowing a nonparty witness to sit at counsel's table despite a sequestration order, see § 245.

Annotations: Propriety and prejudicial effect of permitting nonparty to be seated at counsel's table, 87 ALR3d 238.

37. *Booher v Alhom, Inc.*, 156 Ind App 192,

295 NE2d 841; *Patton v Avis Rent-A-Car Systems, Inc.*, 44 Mich App 556, 205 NW2d 615; *Schaller v Chapman* (App, Franklin Co) 44 Ohio L Abs 631, 66 NE2d 266; *Yates v Pacific Indem. Co.* (Tex Civ App) 193 SW2d 266, writ ref.

38. *United States v Robles-Pantoja* (CA5 Tex) 887 F2d 1250; *United States v Brown* (CA2 NY) 699 F2d 585, 12 Fed Rules Evid Serv 845; *United States v Perry* (CA2 NY) 643 F2d 38, 7 Fed Rules Evid Serv 1224, cert den 454 US 835, 70 L Ed 2d 115, 102 S Ct 138, habeas corpus proceeding (CA2 Conn) 753 F2d 253; *United States v Walker* (CA5 La) 613 F2d 1349, 5 Fed Rules Evid Serv 983, cert den 446 US 944, 64 L Ed 2d 800, 100 S Ct 2172 and cert den 446 US 955, 64 L Ed 2d 813, 100 S Ct 2925; *United States v Shearer* (CA8 Mo) 606 F2d 819, 4 Fed Rules Evid Serv 1434 (disagreed with on other grounds by *United States v Thornberg* (CA8 Minn) 844 F2d 573, cert den 487 US 1240, 101 L Ed 2d 944, 108 S Ct 2913) as stated in *United States v Marin-Cifuentes* (CA8 Minn) 866 F2d 988, 27 Fed Rules Evid Serv 690, cert den (US) 107 L Ed 2d 72, 110 S Ct 110; *United States v Maestas* (CA10 NM) 523 F2d 316; *United States v Zane* (CA2 NY) 495 F2d 683, CCH Fed Secur L Rep ¶ 94517, cert den 419 US 895, 42 L Ed 2d 139, 95 S Ct 174 and cert den 419 US 895, 42 L Ed 2d 139, 95 S Ct 174; *United States v Newsom* (CA5 La) 493 F2d 439; *United States v De Angelis* (CA2 NY) 490 F2d 1004, cert den 416 US 956, 40 L Ed 2d 306, 94 S Ct 1970; *United States v Pellegrino* (CA2 Conn) 470 F2d 1205, cert den 411 US 918, 36 L Ed 2d 310, 93 S Ct 1556; *United States v Cox* (CA5 Tex) 459 F2d 986; *United States v Stidham* (CA10 Okla) 459 F2d 297, cert den 409 US 868, 34 L Ed 2d 118, 93 S Ct 168; *United States v Wells* (CA6 Ohio) 437 F2d 1144; *United States v Johnson* (CA7 Ill) 426 F2d 1112, cert den 400 US 842, 27 L Ed 2d 78, 91 S Ct 86; *United States v Meyer* (CA9 Or) 403 F2d 52; *United States v*

expert witness,⁴¹ and miscellaneous other persons to sit at the counsel's table.⁴²

Garafolo (CA7 Ill) 385 F2d 200, vacated on other grounds 390 US 144, 19 L Ed 2d 970, 88 S Ct 841, on remand (CA7) 396 F2d 952; *Roberson v United States* (CA6 Tenn) 282 F2d 648, cert den 364 US 879, 5 L Ed 2d 102, 81 S Ct 167; *United States v Cephas* (CA7 Ill) 263 F2d 518; *Johnston v United States* (CA10 Kan) 260 F2d 345, cert den 360 US 935, 3 L Ed 2d 1547, 79 S Ct 1454; *United States v Infanzon* (CA2 NY) 235 F2d 318; *Witt v United States* (CA9 Hawaii) 196 F2d 285, cert den 344 US 827, 97 L Ed 644, 73 S Ct 28.

The trial court did not err in allowing a DEA special agent to sit at the government counsel's table. *United States v Perry* (CA2 NY) 643 F2d 38, 7 Fed Rules Evid Serv 1224, cert den 454 US 835, 70 L Ed 2d 115, 102 S Ct 138, habeas corpus proceeding (CA2 Conn) 753 F2d 253.

39. *United States v Jones* (CA8 Mo) 687 F2d 1265, 11 Fed Rules Evid Serv 1145; *Newman v Sigler* (CA8 Neb) 421 F2d 1377, cert den 399 US 935, 26 L Ed 2d 808, 90 S Ct 2267; *Jones v Greer* (CD Ill) 627 F Supp 1481; *United States ex rel. Jacques v Hilton* (DC NJ) 423 F Supp 895; *Smith v State*, 253 Ala 220, 43 So 2d 821; *Dickens v State* (Alaska) 398 P2d 1008; *State v Hanshe*, 105 Ariz 396, 466 P2d 1, supp op 105 Ariz 529, 468 P2d 382; *Maxwell v State*, 188 Ark 111, 64 SW2d 79; *People v Foster*, 48 Cal App 551, 192 P 142; *Martinez v People*, 129 Colo 94, 267 P2d 654; *Blankenship v State* (Ga) 280 SE2d 623, later app 251 Ga 621, 308 SE2d 369, later app 258 Ga 43, 365 SE2d 265, cert den 488 US 871, 102 L Ed 2d 152, 109 S Ct 183; *Hill v State*, 250 Ga 277, 295 SE2d 518, cert den 460 US 1056, 75 L Ed 2d 936, 103 S Ct 1508; *Jackson v State*, 233 Ga 529, 212 SE2d 366; *Holland v State*, 182 Ga App 611, 356 SE2d 700; *Ryles v State*, 177 Ga App 537, 339 SE2d 792; *Edwards v State*, 171 Ga App 264, 319 SE2d 101; *Ross v State*, 135 Ga App 169, 217 SE2d 170; *People v Leemon*, 66 Ill 2d 170, 5 Ill Dec 250, 361 NE2d 573; *People v Jones* (4th Dist) 108 Ill App 3d 880, 64 Ill Dec 346, 439 NE2d 1011 (disagreed with on other grounds by *People v Snow* (2d Dist) 124 Ill App 3d 955, 80 Ill Dec 279, 464 NE2d 1262) and habeas corpus proceeding (CD Ill) 627 F Supp 1481 and (disagreed with on other grounds by *People v Rathgeb* (4th Dist) 113 Ill App 3d 943, 69 Ill Dec 664, 447 NE2d 1351) as stated in *People v Jones* (1st Dist) 148 Ill App 3d 133, 101 Ill Dec 448, 498 NE2d 772, app den (Ill) 106 Ill Dec 52, 505 NE2d 358 and post-conviction proceeding (4th Dist) 174 Ill App 3d 794, 124 Ill Dec 349, 529 NE2d 66; *People v Ong* (3d Dist) 94 Ill App 3d 780, 50 Ill Dec 230, 419 NE2d 97; *People v Dawson* (4th Dist) 32 Ill App 3d 594, 335 NE2d 798; *Brown v State*, 256 Ind 444, 269 NE2d 377; *Kelley v State*, 226 Ind 148, 78 NE2d 547;

State v Tonubbee (La) 420 So 2d 126, cert den 460 US 1081, 76 L Ed 2d 342, 103 S Ct 1768, reh den 462 US 1146, 77 L Ed 2d 1381, 103 S Ct 3132; *State v Fields* (La) 342 So 2d 624, 87 ALR3d 229; *State v Taylor* (La App 2d Cir) 448 So 2d 773; *Glaros v State*, 223 Md 272, 164 A2d 461; *State v Schallock* (Minn) 281 NW2d 186; *State v Teegarden* (Mo App) 559 SW2d 618; *State v Newman*, 179 Neb 746, 140 NW2d 406; *Frank v State*, 150 Neb 745, 35 NW2d 816 (superseded by statute on other grounds as stated in *State v Hopkins*, 221 Neb 367, 377 NW2d 110); *Johnson v State* (Okla Crim) 559 P2d 466; *State v Mancino*, 115 RI 54, 340 A2d 128; *State v Long*, 58 Wash 2d 830, 365 P2d 31, revd on other grounds 372 US 487, 9 L Ed 2d 899, 83 S Ct 774 and cert den 374 US 850, 10 L Ed 2d 1070, 83 S Ct 1914 and cert den 374 US 852, 10 L Ed 2d 1073, 83 S Ct 1919; *State v Fackrell*, 44 Wash 2d 874, 271 P2d 679.

It is accepted procedure to have a party choose one person to stay at counsel's table to aid counsel during the trial even though that person is a witness who will later testify. The state has this right as well as any other party and may choose a police officer even though he is also a witness. *Wisehart v State* (Ind) 484 NE2d 949, cert den 476 US 1189, 91 L Ed 2d 556, 106 S Ct 2929.

40. *Marshall v State*, 101 Ark 155, 141 SW 755; *Norman v State*, 121 Ga App 753, 175 SE2d 119, cert den 401 US 956, 28 L Ed 2d 240, 91 S Ct 981; *State v Shaw*, 96 Idaho 897, 539 P2d 250; *Brewster v Commonwealth* (Ky) 568 SW2d 232; *Bowen v Commonwealth*, 288 Ky 515, 156 SW2d 870; *Miller v Commonwealth*, 270 Ky 378, 109 SW2d 841; *State v Tschirner* (Mo App) 504 SW2d 302.

41. *United States v Phillips* (ED Ky) 515 F Supp 758, 8 Fed Rules Evid Serv 1224; *People v Persky* (3rd Dist) 167 Cal App 2d 134, 334 P2d 219; *Baker v State* (Ind) 506 NE2d 817; *State v Schmack*, 264 Wis 333, 58 NW2d 668.

42. *Nationwide Mut. Ins. Co. v Smith*, 280 Ala 343, 194 So 2d 505; *Florida Greyhound Lines, Inc. v Jones* (Fla) 60 So 2d 396 (not followed on other grounds by *County of St. Lucie v Browning* (Fla App D4) 358 So 2d 253) and (not followed on other grounds by *Moore v Caughey* (Fla App D4) 368 So 2d 109); *Goldman v State*, 130 Tex Crim 471, 95 SW2d 423; *Lott v State*, 123 Tex Crim 591, 60 SW2d 223; *Doe v Hafen* (Utah App) 772 P2d 456, 106 Utah Adv Rep 31, review pending (Utah) 114 Utah Adv Rep 45 and cert gr (Utah) 789 P2d 33, 123 Utah Adv Rep 43 and reh den (Utah App) 786 P2d 1391, cert den (Utah) 800 P2d 1105 and cert den (Utah) 142 Utah Adv Rep 63.

Trial courts may also occasionally allow a relative of a party or a victim to sit at counsel's table for a variety of reasons. Generally, reviewing courts have upheld trial courts' exercise of their discretion in either allowing a relative to sit at counsel's table or ordering the relative removed from that position.⁴³ In some cases, however, where the trial court let the relative stay and where the presence and conduct of the relative demonstrated prejudice, the trial courts have been reversed on appeal.⁴⁴

§ 186. Filing of briefs

The position usually taken by litigants asserting the right to file a trial brief has been that, at least under the circumstances of the particular case, such a brief was essential to a proper hearing and presentation of the party's case, so that the refusal to receive the brief amounted to a denial of due process. While the question has seldom been directly dealt with by the courts, the position usually taken has been that whether such briefs should be received is discretionary with the trial court.⁴⁵

Practice guide: Trial briefs provide an introductory statement of the case, and should be designed to assist the trial judge in conducting a fair trial. They are used to apprise the court of counsel's position and may

Placing the guardian ad litem of a juvenile victim of sexual assault at the prosecution's table is not an abuse of discretion, but rather a practical arrangement best suited to minimize the impact of the guardian ad litem on the jury. This becomes obvious when contrasted with potential alternatives, such as using a third table for the guardian ad litem or having the guardian ad litem address the court from outside the bar. *State v Walsh*, 126 NH 610, 495 A2d 1256.

43. *United States ex rel. Gibbs v Vincent* (CA2 NY) 524 F2d 634; *Crowe v State* (Ala App) 485 So 2d 351, rev'd on other grounds (Ala) 485 So 2d 373, on remand (Ala App) 485 So 2d 378 and cert den 477 US 909, 91 L Ed 2d 573, 106 S Ct 3284; *Lehr v State* (Ala App) 398 So 2d 791; *Brodka v State*, 53 Ala App 125, 298 So 2d 55; *McGuff v State*, 49 Ala App 88, 268 So 2d 868, cert den 289 Ala 746, 268 So 2d 877; *Jackson v State*, 245 Ark 331, 432 SW2d 876 (disapproved on other grounds by *Batson v Kentucky*, 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712); *Keller v Eldridge* (Ky) 471 SW2d 308; *Goehring v Commonwealth* (Ky) 370 SW2d 822; *Spehiots v Coclanes*, 311 Ky 547, 224 SW2d 653; *Bowen v Commonwealth*, 288 Ky 515, 156 SW2d 870; *Miller v Commonwealth*, 270 Ky 378, 109 SW2d 841; *Koeppel v Koeppel* (Mo App) 208 SW2d 929; *Phillips v Creighton*, 211 Or 645, 316 P2d 302; *State v Lee*, 255 SC 309, 178 SE2d 652; *Williams v State*, 155 Tex Crim 370, 235 SW2d 166; *Doe v Hafen* (Utah App) 772 P2d 456, 106 Utah Adv Rep 31, review pending (Utah) 114 Utah Adv Rep 45 and cert gr (Utah) 789 P2d 33, 123 Utah Adv Rep 43 and reh den (Utah App)

786 P2d 1391, cert den (Utah) 800 P2d 1105 and cert den (Utah) 142 Utah Adv Rep 63.

44. *Walker v State*, 132 Ga App 476, 208 SE2d 350; *State v Henry*, 196 La 217, 198 So 910; *Benmark v Steffen*, 374 Mich 155, 132 NW2d 48; *Fuselier v State* (Miss) 468 So 2d 45; *Davis v State*, 140 Tex Crim 597, 146 SW2d 994.

45. *Moran Towing & Transp. Co. v Conners-Standard Marine Corp.* (CA2 NY) 285 F2d 368, 86 ALR2d 1227.

In an admiralty action arising out of a shipowner's failure to pay an invoice for fuel oil, the trial court did not deny the owner procedural due process by allegedly rendering judgment without allowing submission of briefs, where, at the time the trial court entered final judgment, no mention was made by the owner regarding additional evidence and argument. *Gulf Trading & Transp. Co. v Vessel Hoegh Shield* (CA5 Tex) 658 F2d 363, reh den (CA5 Tex) 670 F2d 182 and reh den (CA5 Tex) 670 F2d 182 and cert den 457 US 1119, 73 L Ed 2d 1332, 102 S Ct 2932.

The trial court acted within allowable discretion in the conduct of the trial in refusing to permit the defendant in an action to recover a deposit on a real property purchase to a file brief. *Kwiechien v Gordon*, 33 Conn Supp 637, 365 A2d 118.

As to the filing of amicus curiae briefs, see 4 Am Jur 2d, Amicus Curiae § 4.

Annotations: Right to file briefs in trial court, 86 ALR2d 1233.

Practice References: 5 Am Jur Trials 89, The Trial Brief.

include a statement of the facts, discussion of legal points and authorities, and an explanation of the relief sought. Trial briefs frequently address motions in limine, including those to suppress potentially inadmissible evidence such as collateral source payments, evidence more prejudicial than probative, and the like. Court rules may prescribe the format and/or filing requirements for trial briefs. If the trial brief is long, counsel should summarize the arguments in the beginning, include tables of contents and authorities, and use headings clearly summarizing the content of each section. The brief is an aid to the judge, not a treatise.⁴⁶

■■■■ Observation: Numerous Federal District Courts require that a trial brief be filed setting forth the issues in the case and the points and authorities in support of each party's position.⁴⁷

§ 187. Reading pleadings or indictment to jury

In civil actions, the practice of reading the pleadings to the jury is not desirable,⁴⁸ although it is still within the judge's discretion to allow such practice.⁴⁹ Even in charging the jury it is considered the better practice not to read the pleadings to the jury although they contain a plain statement of the matter in controversy, and the court may in its discretion employ the language thereof in presenting the issues to the jury.⁵⁰

In some states, to avoid giving the jury a distorted view of the case through the stilted language of the indictments, reading indictments to the jury is prohibited by statute.⁵¹

§ 188. Permitting inspection and exhibition of person

Where the physical condition of a party is in question, he may be permitted to exhibit his person to the jury, in the discretion of the court,⁵² subject to the

46. Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 8:17.

As to the preparation, contents, and style of trial briefs, see § 50.

47. 33 Federal Procedure, L Ed, Trial § 77:19.

48. *Gillespie v Draughn*, 54 NC App 413, 283 SE2d 548, petition den 304 NC 726, 288 SE2d 805; *Hollinger v York R. Co.*, 225 Pa 419, 74 A 344; *Nashville, C. & S.L.R. Co. v Anderson*, 134 Tenn 666, 185 SW 677; *Glover v Burke*, 23 Tenn App 350, 133 SW2d 611.

As to pleadings, generally, see 61A Am Jur 2d, Pleadings.

49. *Gillespie v Draughn*, 54 NC App 413, 283 SE2d 548, petition den 304 NC 726, 288 SE2d 805.

50. § 1230.

51. *State v Rogers*, 52 NC App 676, 279 SE2d 881 (holding that the trial court's instruction that "the fact that [defendant] has been indicted constitutes no evidence of his guilt of anything whatsoever" did not contravene the statute prohibiting reading the indictment to

the jury, and was not prejudicial to defendant); *State v Hill*, 45 NC App 136, 263 SE2d 14.

The trial court did not violate the statutes prohibiting reading the indictment to the jury, when it drew information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried. *State v Leggett*, 305 NC 213, 287 SE2d 832.

As to indictments, generally, see 41 Am Jur 2d, Indictments and Informations.

52. *Monk v Doctors Hospital*, 131 App DC 174, 403 F2d 580; *Rich v Ellerman & Bucknall S.S. Co.* (CA2 NY) 278 F2d 704; *Johnson v Sexton*, 276 Ala 332, 161 So 2d 815; *Russell v Coffman*, 237 Ark 778, 376 SW2d 269; *Le Master v Chicago R.I. & P.R. Co.* (1st Dist) 35 Ill App 3d 1001, 343 NE2d 65 (disagreed with on other grounds by *Varilek v Mitchell Engineering Co.* (1st Dist) 200 Ill App 3d 649, 146 Ill Dec 402, 558 NE2d 365, app den (Ill) 149 Ill Dec 339, 561 NE2d 709); *Burnett v Caho* (3d Dist) 7 Ill App 3d 266, 285 NE2d 619; *Hedrich v Borden Co.* (1st Dist) 100 Ill App 2d 237, 241 NE2d 546; *Darling v Charleston Community Memorial Hospital* (4th Dist) 50 Ill App 2d 253, 200 NE2d 149, affd 33 Ill 2d 326,

limitations that the exhibition is not objectionable as being indecent,⁵³ that it is essential to enable the jury better to understand the character of the injury itself, and that the jury will not be led to illegitimate considerations on account of the injury.⁵⁴

In actions to recover damages for personal injuries, courts are deemed to have inherent power to require the plaintiff in a personal injury action to submit, before trial, to a physical examination by competent physicians.⁵⁵

The cases considering the propriety of permitting the plaintiff to exhibit his person to the jury during counsel's closing argument reach diverse results.⁵⁶

The propriety of permitting the jury to make a closeup inspection or a manual examination of the plaintiff's person depends on the circumstances of the individual case.⁵⁷

§ 189. Allowing inspection of articles

Where the condition of personal property is in question, the court may in its discretion order it produced at the trial for inspection.⁵⁸ Where the condition

211 NE2d 253, 14 ALR3d 860, cert den 383 US 946, 16 L Ed 2d 209, 86 S Ct 1204; Wheeler v Helterbrand (Ky) 358 SW2d 501; Core v Winn-Dixie of Louisiana, Inc. (La App 1st Cir) 471 So 2d 240, cert den (La) 476 So 2d 353; Nizer v Phelps, 252 Md 185, 249 A2d 112; Tuttle v McGeeney, 344 Mass 200, 181 NE2d 655; Bates v Detroit, 66 Mich App 701, 239 NW2d 716; Johnson v Clement F. Sculley Constr. Co., 255 Minn 41, 95 NW2d 409; Wilson v Thayer County Agricultural Soc., 115 Neb 579, 213 NW 966, 52 ALR 1393; Beal v Southern Union Gas Co., 66 NM 424, 349 P2d 337, 84 ALR2d 1269; North v Williams (Okla) 366 P2d 406; Pooschke v Union P.R. Co., 246 Or 633, 426 P2d 866; Hendricks v Sanford, 216 Or 149, 337 P2d 974; Auclair v Legare, 82 RI 18, 105 A2d 669, 66 ALR2d 1329; Harper v Bolton, 239 SC 541, 124 SE2d 54; Bellart v Martell, 28 Wis 2d 686, 137 NW2d 729, reh den 28 Wis 2d 694a, 139 NW2d 473.

As to counsel's use of a litigant during summation for the purpose of demonstrating how an accident happened, see § 511.

Generally, as to the exhibition of the person or the human body, see 29 Am Jur 2d, Evidence §§ 777-782.

Annotations: Propriety of permitting plaintiff in personal injury action to exhibit his person to jury, 66 ALR2d 1334 § 3.

Practice References: Courtroom presence of injured plaintiff. 14 Am Jur Trials 101, Glass Door Accidents § 50.

53. Evans v General Explosives Co., 293 Mo 364, 239 SW 487; Bowerman v Columbia Gorge Motor Coach System, Inc., 132 Or 106, 284 P 579.

As to a party's appearing in court on a stretcher or on an invalid's chair, see § 253.

54. Rost v Brooklyn H.R. Co., 10 App Div 477, 41 NYS 1069.

55. 23 Am Jur 2d, Depositions and Discovery §§ 282 et seq.

As to physiological or psychological deception tests, see 29 Am Jur 2d, Evidence § 831.

As to a demonstration by a physical act to show the extent of the injury, see 29 Am Jur 2d, Evidence § 779.

56. Huber & Huber Motor Express v Martin's Adm'r, 265 Ky 228, 96 SW2d 595; Travelers Ins. Co. v Epps (Tex Civ App) 191 SW2d 100, writ ref n r e.

Annotations: 66 ALR2d 1334 § 3[c].

57. Bluebird Baking Co. v McCarthy (App, Franklin Co) 3 Ohio Ops 490, 19 Ohio L Abs 466, 36 NE2d 801.

Whether the plaintiff's hands should be displayed for manual examination by the jurors depends on whether the plaintiff's treating physicians could not describe their present conditions adequately to the jury. Curry v American Enka, Inc. (ED Tenn) 452 F Supp 178.

As to trial court's authority to require an accused or a witness to stand up for purposes of comparison or identification, see 21A Am Jur 2d, Criminal Law §§ 712, 945.

As to compelling accused to make tracks for purpose of comparison as improper self-incrimination, see 21A Am Jur 2d, Criminal Law § 946.

Annotations: 66 ALR2d 1334 § 6.

58. Reams' Admr. v Greer (Ky) 314 SW2d 511; Withey v Pere Marquette R. Co., 141 Mich 412, 104 NW 773.

As to view by jury, see §§ 258 et seq.

As to the inspection of memorandum used to

and appearance of a thing which is in evidence are in question, it is proper to permit the jurors to inspect it in the courtroom to ascertain its condition.⁵⁹ Conversely, where conditions have changed, the court may properly deny an inspection.⁶⁰

The method by which an observation may take place is within the trial court's discretion.⁶¹ Thus, the jurors may be permitted to use a microscope in making an examination,⁶² but the trial court properly rejected the defendant's request that a microscope be brought into the courtroom and the jury be permitted to make independent bullet comparison tests similar to those performed by a ballistics expert where the subject matter was beyond the knowledge of the average layperson and the ballistics evidence had been presented by a qualified expert.⁶³

§ 190. Matters relating to witnesses

The court has the power to control the number of witnesses which may be introduced on a single point.⁶⁴

A court has the inherent power to appoint an impartial expert witness on its own motion.⁶⁵

§ 191. Checklist: Basic trial structure

The basic structure of a trial is as follows, although even this may vary:

- Before the judge enters, counsel may exchange any last minute briefs, proposed jury instructions, exhibits, stipulations, or the like,
- upon entering the court, the judge may have something to say to counsel or counsel may wish to raise preliminary matters or objections:
 - some judges will ask for proposed jury instructions at this point,
 - motions in limine should be made and ruled upon at this point,
 - the judge may inquire regarding settlement of the case to see if a last minute settlement is possible,
 - exhibits may be marked for identification at this point, to save time during trial,
 - witnesses may be excluded from the courtroom,⁶⁶

refresh memory, see 81 Am Jur 2d, Witnesses § 459.

59. *Arnold v Laird*, 94 Wash 2d 867, 621 P2d 138; *Jackson v State*, 28 Tex App 370, 13 SW 451.

See, however, *People v Enright*, 256 Ill 221, 99 NE 936.

60. *State v Farnam*, 82 Or 211, 161 P 417.

61. *Arnold v Laird*, 94 Wash 2d 867, 621 P2d 138.

62. *Spencer v State*, 237 Ind 622, 147 NE2d 581, 72 ALR2d 304; *Evans v Commonwealth*, 230 Ky 411, 19 SW2d 1091, 66 ALR 360.

Annotations: Expert evidence to identify gun from which bullet or cartridge was fired, 26 ALR2d 892 § 11.

63. *Commonwealth v Newsome*, 462 Pa 106, 337 A2d 904.

As to microscopic examination of exhibits in the jury room, see § 1667.

64. *Samuels v United States* (CA8 Kan) 232 F 536.

As to the court's power to control the conduct of witnesses, see § 257.

As to the exclusion of witnesses, see §§ 240 et seq.

As to the attendance of witnesses, generally, see 81 Am Jur 2d, Witnesses §§ 5 et seq.

As to compensation and fees of witnesses, see 81 Am Jur 2d, Witnesses §§ 23 et seq.

65. 31A Am Jur 2d, Expert and Opinion Evidence § 13.

As to instructions relating to expert testimony, see §§ 1190, 1226.

66. As to exclusion of witnesses, see §§ 240 et seq.

- counsel may next be given an opportunity to review information provided by the court about the jury panel, unless this information was available before trial,
- the jury panel is then brought into the court, jury voir dire takes place, and the jury is selected,
- the judge may give preliminary instructions to the jury,
- counsel may then make opening statements,⁶⁷
- plaintiff's counsel presents the plaintiff's case, through testimony, exhibits, and other evidence,
- plaintiff's presentation may be punctuated by cross-examination, objections, or motions by opposing counsel,
- before resting, counsel should confirm that all exhibits have been offered and ruled upon by the judge and that all other essential evidence (like stipulations, admissions, and interrogatories) has been offered,
- once plaintiff rests, the defendant will generally make a motion for a directed verdict or to dismiss (in a bench trial),
- defendant's counsel will then present his or her case, punctuated by the plaintiff's cross-examination, objections, and motions,
- the plaintiff may then move for a directed verdict or judgment as a matter of law,
- if the plaintiff wishes, rebuttal evidence may be offered, followed by any surrebuttal by the defendant,
- once both parties have rested, the judge will generally rule on proposed jury instructions,⁶⁸
- in most jurisdictions, the attorneys will present closing arguments, with the plaintiff arguing first, the defendant second, and the plaintiff presenting a brief reply, but in some jurisdictions the defense argues first with the plaintiff last,⁶⁹
- in most jurisdictions, the judge then reads the instructions to the jury and the jury retires to deliberate,⁷⁰
- in some jurisdictions, the instructions are read first and then counsel present closing arguments,
- in a bench trial, the judge may receive proposed findings of fact and conclusions of law, hear argument, and then decide the case from the bench, take the case under advisement, or request post-trial briefing,
- upon reaching a verdict, the jury returns to the courtroom, reads the verdict,⁷¹ is polled (if requested by counsel),⁷² and is discharged,
- the judge may then hear post-verdict motions or postpone them for briefing and argument,
- the court enters judgment upon the verdict, unless the judge orders otherwise,
- a party unsatisfied by the judgment has a limited time after its entry to notice an appeal or make a post-trial motion,

67. As to right to open and close, see §§ 535 et seq.

68. As to jury instructions, see §§ 1077 et seq.

69. As to argument and comment of counsel, see §§ 544 et seq.

70. As to deliberations of jury, see §§ 1647 et seq.

71. As to verdict, generally, see §§ 1750 et seq.

72. As to polling of jury, see §§ 1763 et seq.

- a party entitled to the benefits of a judgment may receive them voluntarily from the opponent or by initiating proceedings to enforce the judgment.⁷³

B. FAIR TRIAL [§§ 192–204]

Research References

ALR Digest to 3d, 4th, and Federal, Criminal Law § 112.5; Trial § 3
 Index to Annotations, Jury and Jury Trial; Trial; Trial by Court
 9 Federal Procedure, L Ed, Criminal Procedure §§ 22:808-22:810; 33 Federal Procedure, L Ed, Trial § 77:186
 1 Am Jur Trials 303, Controlling Trial Publicity
 Bailey & Rothblatt, Investigation and Preparation of Criminal Cases (2d ed, 1985), Chapter 33

1. IN GENERAL [§§ 192–195]

§ 192. Generally

Litigants have a right to have their causes tried fairly in court by an impartial tribunal.⁷⁴ The object of a trial is to secure a fair and impartial administration of justice between the parties to the litigation.⁷⁵

|||| Caution: A court proceeding and all its phases must not only be fair and impartial but also must appear to be fair and impartial.⁷⁶

The right to a trial includes the right to be heard, to produce witnesses and documents, to examine and cross-examine witnesses, to present arguments, and to have the case decided upon the merits.⁷⁷ While the right to a fair trial does not require a perfect trial,⁷⁸ the very heart of a fair trial embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment.⁷⁹

73. Danner & Toothman, Trial Practice Checklists (1989) § 8:20.

74. Hughes v Territory, 10 Ariz 119, 85 P 1058; Duhon v State, 299 Ark 503, 774 SW2d 830; State ex rel. Gore Newspapers Co. v Tyson (Fla App D4) 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by English v McCrary (Fla) 348 So 2d 293, 2 Media L R 1903) as stated in Miami Herald Pub. Co. v Lewis (Fla) 426 So 2d 1, 8 Media L R 2281; Gutsch v Hyatt Legal Services (Minn App) 403 NW2d 314; Fitzpatrick v St. Louis, S.F.R. Co. (Mo) 327 SW2d 801, 80 ALR2d 825; Sandstrom v Oregon W.R. & N. Co., 69 Or 194, 136 P 878; State v Stewart, 278 SC 296, 295 SE2d 627, 29 ALR4th 649, cert den 459 US 828, 74 L Ed 2d 65, 103 S Ct 64.

75. Gutsch v Hyatt Legal Services (Minn App) 403 NW2d 314.

76. Duhon v State, 299 Ark 503, 774 SW2d 830.

77. Bettes v Fuel-Scott (Minn App) 415 NW2d 409 (further holding that the trial court erred in failing to afford the appellant a meaningful

right to be heard where appellant was allowed to take the stand to testify for approximately 10 minutes and to answer about 10 questions on the substance of the lawsuit as she was not allowed an adequate opportunity to explain her side of the story); Gutsch v Hyatt Legal Services (Minn App) 403 NW2d 314.

The defendant's right to a fair trial by an impartial jury was impaired by the presence and activities of representatives of Mothers Against Drunk Drivers (MADD), which included from 10 to 30 MADD demonstrators in the court throughout the trial, including the county sheriff, who was in uniform, during the defendant's trial on drunk driving charges. State v Franklin (W Va) 327 SE2d 449.

78. State v Martin (La) 550 So 2d 568; State v Nearhood, 233 Neb 767, 448 NW2d 399; State v Stewart, 278 SC 296, 295 SE2d 627, 29 ALR4th 649, cert den 459 US 828, 74 L Ed 2d 65, 103 S Ct 64.

79. State v Stewart, 278 SC 296, 295 SE2d 627, 29 ALR4th 649, cert den 459 US 828, 74 L Ed 2d 65, 103 S Ct 64 (further holding that

In a criminal proceeding, the concept of a fair trial applies both to the state and to the defense.⁸⁰

■■■■ *Observation:* A person accused of crime enjoys the fundamental right of a fair trial under the Sixth and Fourteenth Amendments. But, it has been noted, strangely, the right of the people to a fair trial, as a correlative to that enjoyed by the accused, does not appear to be stated in constitutional terms. Nevertheless, it seems implicit in any concept of due process that society is entitled to a fair trial for redress of wrongs against it and that the victim of a criminal wrong is certainly entitled to the same right.⁸¹

■■■■ *Reminder:* A civil litigant is no less entitled to a fair and impartial trial than a defendant in a criminal case.⁸²

§ 193. Discretion, duty of trial judge

The responsibility of striving for an atmosphere of impartiality during the course of a trial rests upon the trial judge.⁸³ After a jury has been selected, it is the duty of the trial court to exclude evidence of matters foreign to the issues, so that the minds of the jurors may not be prejudiced in reference either to the litigants or to the matters on trial.⁸⁴

Even though the trial judge runs the court, the right of an accused to a fair trial, although not a perfect trial, is paramount. If the exercise of discretion results in the denial of a fair trial to a defendant, the discretion is certainly abused.⁸⁵ Thus, for instance, the trial judge abused his discretion in allowing the guards who escorted the accused to wear rubber gloves because he believed there was a possibility that the accused was infected with the AIDS virus, where the judge acted on an unidentified source of information and made no effort to ascertain the true state of the defendant's health.⁸⁶

the sole reliance by the trial judge on his instructions to the jury to disregard improper spectator conduct and on his several admonitions to the courtroom in general was insufficient to assure the defendant a fair trial where the trial took place in an overcrowded and noisy courtroom).

80. *State v Carter*, 143 NJ Super 405, 363 A2d 366, later app 144 NJ Super 302, 365 A2d 473.

The fact that a jury trial lasts for more than a year does not in and of itself prove that criminal defendants were denied a fair trial. *People v Clemente*, 8 NY2d 1, 200 NYS2d 625, 167 NE2d 327, remittitur amd 8 NY2d 1003, 205 NYS2d 340, 169 NE2d 431, cert den 364 US 923, 5 L Ed 2d 262, 81 S Ct 289.

As to criminal defendants' constitutional rights to a fair trial, see 21A Am Jur 2d, Criminal Law §§ 646-651, 836-848.

81. *Sun Co. of San Bernardino v Superior Court of San Bernardino County* (4th Dist) 29 Cal App 3d 815, 105 Cal Rptr 873.

82. *State ex rel. Gore Newspapers Co. v*

Tyson (Fla App D4) 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by *English v McCrary* (Fla) 348 So 2d 293, 2 Media L R 1903) as stated in *Miami Herald Pub. Co. v Lewis* (Fla) 426 So 2d 1, 8 Media L R 2281.

83. *Gutsch v Hyatt Legal Services* (Minn App) 403 NW2d 314.

The trial court erred in exercising its discretion by erroneously determining that a trial is fair if both sides suffer equally where the acoustic conditions in the courtroom were so intolerable and so interfered with the orderly conduct of the trial that the defendant was denied a fair trial. *People v Vaughn*, 128 Mich App 270, 340 NW2d 310.

84. *Hughes v Territory*, 10 Ariz 119, 85 P 1058; *Hudson v State*, 108 Ga App 192, 132 SE2d 508, 100 ALR2d 1395; *Rea v Rea*, 195 Or 252, 245 P2d 884, 35 ALR2d 612.

85. *Wiggins v State*, 315 Md 232, 554 A2d 356.

86. *Wiggins v State*, 315 Md 232, 554 A2d 356.

§ 194. Courtroom security

Within the bounds of the right of the defendant to a fair trial, it is the court that is responsible for the security of the courtroom, and it decides, first, whether any special security is needed, and second, from the most appropriate security safeguards under the particular circumstances. When measures are taken in the courtroom to insure security, the government must invoke the least intrusive means of meeting the governmental interests at risk.⁸⁷ For example, a magnetometer is no more than a precautionary device to make certain that unbalanced persons and others with an aim bent on mischief or worse will not disrupt courtroom proceedings; it is known to the public as such; and it does not violate the defendants' rights to require visitors to pass through such a device to enter the courtroom.⁸⁸

§ 195. Tape recording of proceeding

The use of an electronic device is subject to the supervision of the trial judge, who may take reasonable measures to assure that the use of the device does not interfere with the dignity, order, and decorum of the court. What the trial judge may not do is arbitrarily deny counsel the right to use a recording device.⁸⁹ Denial of permission to tape record proceedings is not error, however, when an official court reporter is present who can provide partial transcripts if requested.⁹⁰

2. TRIAL PUBLICITY [§§ 196–204]

a. IN GENERAL [§§ 196–199]

§ 196. Generally

Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law.⁹¹ Although a fair trial is not interfered with by a newspaper account which does not prejudice either party,⁹² no trial should be influenced

⁸⁷. *United States v Whitehorn* (DC Dist Col) 710 F Supp 803.

⁸⁸. *United States v Whitehorn* (DC Dist Col) 710 F Supp 803.

⁸⁹. *Davey v Atlanta*, 130 Ga App 687, 204 SE2d 322, 67 ALR3d 1010 (further holding that there was no valid reason why a party or his counsel may not use a recording device in order to assist in perfecting a record (holding limited to use by counsel or party of microphonic recording device as work product for their personal future use and possible retrial or appeal of case)).

As to the effect of cameras in the courtroom on a defendant's right to a fair trial, see § 198.

⁹⁰. *State v Clark*, 126 Ariz 428, 616 P2d 888, cert den 449 US 1067, 66 L Ed 2d 612, 101 S Ct 796, habeas corpus proceeding (CA9 Ariz) 886 F2d 1152.

As to presence of court reporters, generally, see §§ 236 et seq.

⁹¹. *Chandler v Florida*, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media L R 1041.

■■■■ *Practice guide:* For recommended standards governing conduct of criminal trial when problems are raised relating to the dissemination of potentially prejudicial material, see ABA Standards, Fair Trial and Free Press § 3.5.

Law Reviews: Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*. 18 Hofstra L Rev 1 (Summer, 1989).

⁹². *State v McLaughlin*, 250 Iowa 435, 94 NW2d 303; *State v Peirce*, 178 Iowa 417, 159 NW 1050 (ovrld on other grounds by *State v McLaughlin*, 250 Iowa 435, 94 NW2d 303).

Impartiality of the jury was fairly supported

by newspaper dictation or popular clamor.⁹³

Jury impartiality does not compel complete juror ignorance of issues and events.⁹⁴ A juror need only be able to put aside impressions gained from publicity and decide the case on the evidence presented.⁹⁵ Pretrial publicity may, however, be so prejudicial as to require that a conviction be set aside.⁹⁶

The usual remedy for adverse pretrial publicity is a change of venue, and this should be so whether the adverse publicity is in the form of a printed newspaper or television exposure.⁹⁷

■■■■ Observation: In the face of intense public interest, a client's right to a fair trial must be protected. To accomplish this, counsel must know how to keep the press from hurting him. Counsel's job is threefold: First, upon entering as counsel, the client must be told what to expect in terms of publicity. Second, counsel must stress that the responsibility for dealing with the press now rests with counsel. Not only can publicity surrounding a case influence the trial of the client, but it can affect his post-trial life as well. Counsel must make it clear that he will not be able to adequately protect the client's right to an impartial trial unless the client leaves public and press relations totally in counsel's hands. The third prong of counsel's role with the press is learning to deal with the media in a straightforward and confident manner.⁹⁸

§ 197. Demonstration or presumption of prejudice

Where juror exposure to pretrial publicity can be shown, the defendant

by the record, where media coverage was widespread, but there were no allegations or indications in the record that the publicity was anything but accurate and objective. *Clark v Wood* (CA8 Minn) 823 F2d 1241, cert den 484 US 945, 98 L Ed 2d 361, 108 S Ct 334.

93. *Hilliard v Arizona* (CA9 Ariz) 362 F2d 908; *United States v Agueci* (CA2 NY) 310 F2d 817, 99 ALR2d 478, cert den 372 US 959, 10 L Ed 2d 11, 83 S Ct 1013, later proceeding (SD NY) 741 F Supp 409, later proceeding (SD NY) 1990 US Dist LEXIS 6362 and cert den 372 US 959, 10 L Ed 2d 12, 83 S Ct 1016; *Hughes v Territory*, 10 Ariz 119, 85 P 1058.

As to the control of the news media in the courtroom, see § 212.

Generally, as to the effect of pretrial publicity in criminal cases, see 21A Am Jur 2d, Criminal Law §§ 648, 841.

As to hostile public sentiment or prejudice as ground for continuance in civil case, see 17 Am Jur 2d, Continuance § 57.

As to popular excitement or prejudice as ground for continuance of criminal trial, see 17 Am Jur 2d, Continuance §§ 114, 115.

94. *United States v Bates* (CA7 Ill) 852 F2d 212; *Clark v Wood* (CA8 Minn) 823 F2d 1241, cert den 484 US 945, 98 L Ed 2d 361, 108 S

Ct 334; *United States v Reynolds* (CA7 Ill) 821 F2d 427, later proceeding (ND Ill) 1988 US Dist LEXIS 2640, post-conviction proceeding (ND Ill) 1990 US Dist LEXIS 7560.

95. *United States v Bates* (CA7 Ill) 852 F2d 212; *Clark v Wood* (CA8 Minn) 823 F2d 1241, cert den 484 US 945, 98 L Ed 2d 361, 108 S Ct 334 (further holding that, where the voir dire testimony demonstrated that the jurors who were ultimately seated had not formed an opinion about the murder and that each could base his or her decision on the evidence presented, the impartiality of the jury was fairly supported by the record); *United States v Reynolds* (CA7 Ill) 821 F2d 427, later proceeding (ND Ill) 1988 US Dist LEXIS 2640, post-conviction proceeding (ND Ill) 1990 US Dist LEXIS 7560.

96. *Clark v Wood* (CA8 Minn) 823 F2d 1241, cert den 484 US 945, 98 L Ed 2d 361, 108 S Ct 334.

97. *State v McNaught*, 238 Kan 567, 713 P2d 457, 12 Media L R 1890.

As to change of venue, generally, see 77 Am Jur 2d, Venue §§ 77 et seq.

98. *Bailey & Rothblatt, Investigation and Preparation of Criminal Cases* (2d ed, 1985) § 33:3.

must also demonstrate that actual prejudice resulted,⁹⁹ although prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime. Under such circumstances, it is not necessary to demonstrate actual bias. The presumed prejudice principle is rarely applicable, however, and is reserved for an extreme situation.¹

To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters.²

■■■■ Observation: The jury selection system is without the capacity to determine whether the influences of substantial pre-trial publicity may be extinguished from a given juror's mind. Elementary principles of group psychology, as well as empirical findings, make clear that, where questions are put to the panel as a whole, the average potential juror will be extremely reluctant to disclose his biases. He knows that he is supposed to be fair and impartial. Knowing that, and being subject to the peer pressure of the courtroom setting, not to mention the intimidating nature of the whole experience to the first time juror, he will be unlikely to admit that he cannot give the accused a fair hearing, even though he suspects that to be the fact. For these and other reasons, voir dire, even when most skillfully performed, is often ineffective to discover the extent to which a juror's vote may be affected by what he has heard about a case.³

99. *United States v Reynolds* (CA7 Ill) 821 F2d 427, later proceeding (ND Ill) 1988 US Dist LEXIS 2640, post-conviction proceeding (ND Ill) 1990 US Dist LEXIS 7560.

In the prosecution of defendant, the leader of a "family," for murder, publicity from an alleged robbery of gun shop during the trial by a group of defendant's followers to obtain guns to rescue him by taking the judge and prosecutor hostage, did not deny defendant a fair trial and due process of law, where it was clear from the trial court's interrogation of the jurors following the incident that some of them had very slight knowledge of the news media stories about the gun shop robbery and such slight knowledge had no effect whatsoever on their ability to sit in judgment fairly and impartially, where the trial judge excused one juror due to the facts that she had read the news article in violation of the court order and that she was in a very emotional state resulting from a killing in her apartment house, and where defendant's lawyer appeared to be satisfied with the interrogation of the jurors conducted by the court. *People v Manson* (2nd Dist) 71 Cal App 3d 1, 139 Cal Rptr 275, cert den 435 US 953, 55 L Ed 2d 803, 98 S Ct 1582.

1. *Harris v Pulley* (CA9 Cal) 885 F2d 1354, cert den (US) 107 L Ed 2d 848, 110 S Ct 854, later proceeding (CA9) 901 F2d 724, motion to vacate den (US) 108 L Ed 2d 781, 110 S Ct

1799, habeas corpus proceeding (CA9 Cal) 913 F2d 606, remanded (CA9) 91 CDOS 2231, 91 Daily Journal DAR 3441, reported at, amd (CA9) 91 Daily Journal DAR 3605.

■■■■ Observation: One court has explained that many whose views may be substantially affected by pre-trial publicity may not know that they are incapable of sitting as fair and impartial jurors, and many who allow bias and prejudice to affect their relationships with an attitude toward their fellow man may believe quite sincerely that they are impartial and fair minded persons. Most of us, the court stated, do not include among those to whom justice is due every individual within the constitution. The court is not required to leave its common sense at home when approaching judicial resolution of such questions, and, the court continued, common sense informs the court that there may be cases where the likelihood of impaneling, in the county of a capital murder, a jury which is in fact fair and impartial is so doubtful that the prosecution should be saddled with a heavy burden of showing why venue should not be changed; in such cases doubt should be presumed, although rebuttably so. *Fisher v State* (Miss) 481 So 2d 203.

2. *Chandler v Florida*, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media L R 1041; *People v Spring* (4th Dist) 153 Cal App 3d 1199, 200 Cal Rptr 849.

3. *Fisher v State* (Miss) 481 So 2d 203.

§ 198. Presence of cameras in courtroom

The presence of cameras in the courtroom is not inherently prejudicial.⁴ The decision whether to allow cameras in the courtroom in a particular case is submitted to the sound discretion of the trial court.⁵

■■■■ Observation: Publicity in civil trials in federal court is largely regulated by local District Court rules. In accordance with recommendations of the Judicial Conference of the United States, many District Courts have promulgated rules which prohibit photography in, or television or radio broadcasting from, courtrooms or their environs during the progress of or in connection with judicial proceedings, regardless of whether the court is actually in session.⁶

No doubt the very presence of a camera in the courtroom makes the jurors aware that the trial is thought to be of sufficient interest to the public to warrant coverage, but the defendant must show with specificity that the presence of cameras impairs the ability of the jurors to decide the case on only the evidence before them or that the trial has been effected adversely by the impact on the participants of the presence of cameras and the prospect of broadcast.⁷ The mere fact of a televised trial does not constitute evidence that the pre-trial publicity surrounding the defendant's trial was joined by media theatrics sufficient to convert the totality of courtroom circumstances into a "circus" and thereby deprive the appellant of his right to courtroom calm.⁸

The courts have cautioned that there may be circumstances under which broadcast or photographic coverage should be prohibited, particularly when it would have a substantial adverse effect on a trial participant. Whether broadcast or photographic coverage of court proceedings, particularly criminal trials, violates the constitutional rights of trial participants, particularly criminal defendants, depends upon the circumstances under which such coverage takes place. Suggested relevant circumstances are the location of the broadcasters' photographic equipment in the courtroom; the degree of distraction or disruption, if any, caused by the presence; and the effect of the presence and use of such equipment on the defendant's ability to present his case.⁹

■■■■ Practice guide: The problem of media audio and television coverage of a preliminary hearing, as distinguished from a trial proceeding, is somewhat different, because a preliminary hearing is a pretrial proceeding for the determination of probable cause, and trial jurors are not present so as to be personally affected by the media coverage of the preliminary hearing. It is well recognized, however, that adverse publicity at a prelimi-

4. *King v State* (Fla) 390 So 2d 315; *Diehl v Commonwealth*, 9 Va App 28, 384 SE2d 801; *State v Hanna* (W Va) 378 SE2d 640, 17 Media L R 1411.

Law Reviews: Platte, *TV in the Courtrooms: Right of Access?* 3 Com Law 11 (Winter, 1981).

5. *Diehl v Commonwealth*, 9 Va App 28, 384 SE2d 801.

6. 33 Federal Procedure, L Ed, Trial § 77:186.

7. *People v Spring* (4th Dist) 153 Cal App 3d 1199, 200 Cal Rptr 849; *State v Harries* (Tenn) 657 SW2d 414, habeas corpus proceeding (MD

Tenn) 589 F Supp 362, later op (MD Tenn) 594 F Supp 949, later proceeding (MD Tenn) 609 F Supp 1432, 85 ALR Fed 723, app dismd, remanded (CA6 Tenn) 788 F2d 356, later proceeding (CA6 Tenn) 829 F2d 581, post-conviction proceeding (Tenn Crim) 1990 Tenn Crim App LEXIS 606, reh den (Tenn Crim) 1990 Tenn Crim App LEXIS 730.

8. *Brooks v State*, 244 Ga 574, 261 SE2d 379, vacated, in part on other grounds 446 US 961, 64 L Ed 2d 821, 100 S Ct 2937.

9. *State v McNaught*, 238 Kan 567, 713 P2d 457, 12 Media L R 1890.

nary hearing may endanger the ability of a defendant to receive a fair trial in situations where prospective trial jurors read or hear the adverse publicity and are affected in their judgment should they later sit as jurors.¹⁰

§ 199. Checklist: Relations with communications media

The attorney should keep the following rules in mind in conducting press relations:

- Always be available to the press;
- Provide telephone contact at any time, day or night;
- Give interviews without delay;
- Anticipate press interest and prepare statements;
- Be truthful; misleading information destroys good press relations;
- Give all the facts that can be given;
- If in doubt as to information accuracy, check the facts and promptly transmit desired information to news media requesting it;
- Where facts must be withheld, tell the reporter so and give him or her the reason;
- Deal directly and impartially with reporters;
- Do not give editors or publishers news that should be handled by reporters;
- Do not give one reporter information received from another;
- Avoid exerting pressure on newspeople to print or withhold publication of news;
- If it is essential to give a reporter information that is not to be published, establish a clear understanding of exactly what is not intended for publication and why;
- Do not expect or request reporters to submit stories to you for approval before publication; and
- Compliment reporters and editors for their good handling of news items concerned with the case.¹¹

The goal of criminal defense counsel's dealings with the media is to put forward a good image for the client and for counsel as a fair-minded and responsible attorney. It is counsel's duty to serve only the client and not counsel's own self-interest when dealing with the media. Counsel should not obscure the truth or interfere in any way with the administration of justice. According to the Disciplinary Rules of the American Bar Association's Code of Professional Responsibility, an attorney must not sponsor publicity which will prejudice the due administration of justice. Counsel's conduct must therefore convince others that counsel has respect for and trust in the judicial process. Counsel should remember that in cultivating good media relations, newspeople do not have to like counsel personally, but they must feel they can trust and respect counsel, and that trust and respect is earned by answering questions truthfully. Misleading information destroys good press relations. If counsel must withhold facts from a reporter, he or she should explain why it is

10. *State v McNaught*, 238 Kan 567, 713 P2d 457, 12 Media L R 1890.

11. 1 Am Jur Trials 303, Controlling Trial Publicity § 20.

necessary to do so.¹²

b. AVOIDING OR CONTROLLING PUBLICITY [§§ 200–204]

§ 200. Generally

A court has the power to control the publicity about a trial. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, trial courts must take strong measures to insure that the balance is never weighed against the accused.¹³ Indeed, courts may take appropriate action where newspaper and other publications are calculated or intended to cause substantial prejudice to litigants.¹⁴ Thus, in a criminal case, the court should make an effort to control the release of leads, information, and gossip to the press by such persons as police officers, the coroner, witnesses, and the counsel for both sides, and can warn reporters who write or broadcast prejudicial stories as to the impropriety of publishing material not introduced in the proceedings.¹⁵

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case, be it printed or broadcast, compromised the ability of the particular jury that heard the case to adjudicate fairly.¹⁶

12. Bailey & Rothblatt, *Investigation and Preparation of Criminal Cases* (2d ed 1985) §§ 33:1, 33:6.

13. Sheppard v Maxwell, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media L R 1220.

Practice References: Control of trial publicity. 1 Am Jur Trials 303, Controlling Trial Publicity § 2.

Protection of right to fair and impartial trial. 1 Am Jur Trials 303, Controlling Trial Publicity §§ 29-38.

Forms: Motion and notice—For order controlling publicity. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:856.

14. Sheppard v Maxwell, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media L R 1220.

As to punishing proscribed publication as contempt, see 17 Am Jur 2d, Contempt §§ 120 et seq.

Practice References: Courtroom public relations. 1 Am Jur Trials 303, Controlling Trial Publicity §§ 26-28.

—Combating adverse publicity. 1 Am Jur Trials 303, Controlling Trial Publicity §§ 40-42.

15. Sheppard v Maxwell, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media L R 1220.

Generally, as to the duties and obligations of prosecuting attorneys regarding their conduct in trial or prosecutions of a cause, see 63A Am Jur 2d, Prosecuting Attorneys §§ 26-28.

Practice References: Legal ethics and trial publicity. 1 Am Jur Trials 303, Controlling Trial Publicity §§ 7-9.

See ABA Model Rules of Professional Conduct (1983), Rule 3.6

See also ABA Standards for Criminal Justice (1980), Chapt. 3, The Prosecution Function; Chapt. 4, The Defense Function.

16. Chandler v Florida, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media L R 1041.

§ 201. Gag orders

A pretrial order forbidding public comment about a pending criminal case by the attorneys, defendants, and witnesses has been held valid under the First, Fifth, and Sixth Amendments to the United States Constitution.¹⁷

Similarly, in civil cases, a restraining order has been upheld on the rationale that public comment by counsel could have had a detrimental impact on the integrity of the trial,¹⁸ although preservation of the trial's integrity has also provided a rationale for courts to quash orders imposing prior restraints on parties or their counsel, finding no justification for such orders unless the party seeking restraint was able to demonstrate that publicity would influence the jury or otherwise adversely impact on the proceedings.¹⁹ At least one court has used the rationale that extrajudicial communications about the proceedings interfered with contractual relationships to uphold an order restraining such communications.²⁰

Limitations placed upon lawyers, litigants, and officials directly affected by court proceedings may be made at the court's discretion for good cause to assure fair trials. Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been recognized as within the court's inherent power to control professional conduct. A constant spotlight of

As to sequestration of the jury to assure that publicity during the trial does not impinge upon the fair trial of the accused, see § 1645.

17. *Levine v United States Dist. Court for Cent. Dist.* (CA9) 764 F2d 590, 11 Media L R 2289, reh den, en banc (CA9) 775 F2d 1054, 12 Media L R 1458, cert den 476 US 1158, 90 L Ed 2d 719, 106 S Ct 2276 and later proceeding (CA9 Cal) 781 F2d 1443, 12 Media L R 1739; *Re Russell* (CA4) 726 F2d 1007, 10 Media L R 1359, cert den 469 US 837, 83 L Ed 2d 74, 105 S Ct 134; *Chase v Robson* (CA7 Ill) 435 F2d 1059; *United States v Tijerina* (CA10 NM) 412 F2d 661, 5 ALR Fed 935, cert den 396 US 990, 24 L Ed 2d 452, 90 S Ct 478; *Hamilton v Municipal Court for Berkeley-Albany Judicial Dist.* (1st Dist) 270 Cal App 2d 797, 76 Cal Rptr 168, 33 ALR3d 1029, cert den 396 US 985, 24 L Ed 2d 449, 90 S Ct 479.

For a summary of the efforts of the organized bench and bar, as well as certain government agencies, to formulate effective rules and policies in this area, see 5 ALR Fed 948 § 2[a].

For recommendations relating to conduct of attorneys in criminal cases, with respect to public discussion of pending or imminent criminal litigation, see ABA Standards, Fair Trial and Free Press §§ 1.1-1.3; for recommendations relating to the conduct of law enforcement officers, judges, and judicial employees in criminal cases, see ABA Standards, Fair Trial and Free Press §§ 2.1-2.4.

As to pretrial publicity in criminal cases, generally, see 21 Am Jur 2d, Criminal Law § 236.

Annotations: Validity and construction of state court's pretrial order precluding publicity

or comment about pending case by counsel, parties, or witnesses, 33 ALR3d 1041 § 3.

Validity and construction of federal court's pretrial order precluding publicity or comment about pending case by counsel, parties, or witnesses, 5 ALR Fed 948 § 3.

Practice References: Gag orders on parties, counsel, and witnesses. 9 Federal Procedure, L Ed, Criminal Procedure § 22:810.

18. *Shevin v Thuotte* (Fla App D2) 339 So 2d 253.

Annotations: Validity and construction of state court's order precluding publicity or comment about pending civil case by counsel, parties, or witnesses, 56 ALR4th 1214 § 3[a].

19. *Quinn v Aetna Life & Casualty Co.* (ED NY) 482 F Supp 22, 5 Media L R 1310, affd (CA2 NY) 616 F2d 38, 5 Media L R 2432 (disagreed with by *Insinga v La Bella* (CA11 Fla) 845 F2d 249, ctdf ques ans (Fla) 543 So 2d 209, 14 FLW 214, later proceeding (CA11 Fla) 876 F2d 883); *Kemner v Monsanto Co.*, 112 Ill 2d 223, 97 Ill Dec 454, 492 NE2d 1327, 56 ALR4th 1191; *Cooper v Rockford Newspapers, Inc.* (2d Dist) 34 Ill App 3d 645, 339 NE2d 477; *Kleman v Charles City Police Dept.* (Iowa) 373 NW2d 90, 12 Media L R 1030; *Economy Carpets Mfrs. & Distributors, Inc. v Better Business Bureau, Inc.* (La) 330 So 2d 301.

Annotations: 56 ALR4th 1214 § 3[b].

20. *Karamchandani v Ground Technology, Inc.* (Tex App Houston (14th Dist)) 678 SW2d 580, writ dism w o j (Nov 14, 1984).

Annotations: 56 ALR4th 1214 § 4.

public attention focused on public officials during litigation makes it imperative that they be more subject to judicial restrictions against inflammatory and prejudicial statements than other persons.²¹ It is in no way objectionable for a trial court to issue an order governing matters such as extrajudicial statements by parties or witnesses which would seem likely to interfere with the rights of the accused to a fair trial by an impartial jury.²²

In a state murder case tried before a jury, the trial judge may proscribe extrajudicial statements by any lawyer, party, witness, or court official which divulge prejudicial matters, such as the refusal of the defendant to submit to interrogation or take lie detector tests, any statement made by the defendant to officials, the identity of prospective witnesses or their probable testimony, any belief in guilt or innocence, or like statements concerning the merits of the case.²³ However, the reviewing court vacated the order of the District Court barring counsel in a criminal prosecution from speaking to members of the press between the time jury selection began and the time the jury returned its verdict, where there was no showing that prejudice could result from the statements made to the press by counsel, and where there had been no showing that statements were likely to be made at all.²⁴

§ 202. Checklist: Remedies of accused to control publicity

There are several measures which the accused may take, with the concurrence of the court, to control publicity, and if the accused fails to take such remedies, there is no reason not to affirm his conviction even though tainted by pretrial publicity.

Among the remedies which the accused may take are a motion for—

- a change of venue;
- continuance until the prejudice from publicity has abated;
- disqualification for cause of jurors prejudiced by pretrial publicity;
- the selection of a panel of jurors from a division of the district other than the division in which the prosecution is pending;
- closure of a pretrial suppression hearing, or even of the trial itself; or
- sequestration of the jury, although separation of the jury is ordinarily held to be within the discretion of the court.²⁵

§ 203. Checklist: Techniques for avoiding publicity

Litigation publicity seems to be inevitable. Any altercation involving a trial

21. *State ex rel. Miami Herald Pub. Co. v McIntosh* (Fla) 340 So 2d 904, 2 Media L R 1328.

22. *State v Schmid*, 109 Ariz 349, 509 P2d 619.

The nature of publicity given to a shotgun killing of a 4-year-old girl in front of or near her home provided ample justification for a protective order at the time it was made, in view of the reasonable likelihood of publicity tending to prevent a fair trial. *Younger v Smith* (2nd Dist) 30 Cal App 3d 138, 106 Cal Rptr 225.

23. *Sheppard v Maxwell*, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media L R 1220.

24. *Re Application of New York Times Co.* (CA2 NY) 878 F2d 67, 16 Media L R 1877.

In a criminal prosecution, a trial court's order imposing restraints on public comment by, inter alia, defendants and attorneys associated with the case was invalid where the trial court made no specific finding showing that there was reasonable likelihood of prejudicial pretrial publicity which would make it difficult to impanel an impartial jury and which would tend to prevent a fair trial. *State v Carter*, 143 NJ Super 405, 363 A2d 366, later app 144 NJ Super 302, 365 A2d 473.

25. 9 Federal Procedure, L Ed, Criminal Procedure § 22:809.

stimulates some publicity. Unless a trial has absolutely no public interest, it is highly improbable that all publicity can be avoided. There are, however, steps that can be taken to limit the amount of publicity that a case receives. The following steps involve techniques of stopping publicity at its various sources, that is, the parties and their attorneys, the court records, and the trial itself:

- Make no statement to any media of communication (even if the client and counsel agree to say nothing to the press, this does not insure that the opposing party or his counsel will not reveal the facts of the case in an unfavorable light, although it is conceivable that in some cases both parties want no publicity, and an agreement could be reached between the parties and their counsel as to what news is to be given or withheld).
- Determine whether access to public judicial records can be restricted (generally, the right to inspect public records has been so firmly established that attempted restrictions of the right are seldom successful) (the procedure for obtaining a court order restricting access to these records is to make a motion, filed with the pleadings, that the records be sealed; the motion is more likely to be granted if both parties join in it).
- The trial lawyer should make it abundantly clear that he has no quarrel with the district attorney per se; he is concerned only with the facts, the evidence, the judge, and the jurors. The attorney should never belittle a policeman unless he is positive that the policeman is wrong.
- Publicity deriving from the trial itself may also be restricted by a statute permitting in camera trials, or through a motion to exclude the public from the courtroom.²⁶
- There are methods whereby the type of publication can be limited (these methods generally involve court orders restricting the extent of publication, or statutes specially limiting the publication of certain matters concerning a trial. The use of these methods is limited, due to their tendency to restrain freedom of speech).
- Secure an agreement not only among the parties and their counsel, but also with mass publication media not to publicize certain aspects of the case, or to limit the amount or type of publicity that a case receives.²⁷

§ 204. Checklist: Techniques for trial court to mitigate effects of pretrial publicity

The trial court is charged with the responsibility of mitigating the effects of pretrial publicity by,

- asking prospective jurors on voir dire if they could remain impartial despite being exposed to pretrial publicity;
- ordering parties, counsel, and witnesses not to comment about the pending case;²⁸
- instructing the jurors to remain impartial, to disregard all matters other than the evidence presented, or to refrain from reading certain publicity which appeared before the trial;²⁹

26. As to closure of proceedings, generally, see §§ 206 et seq.

28. As to gag orders, see § 201.

27. 1 Am Jur Trials 303, Controlling Trial Publicity § 39.

29. As to jury instructions, generally, see §§ 1077 et seq.

- interrogating the jurors during the trial as to whether they have read newspaper articles pertaining to the alleged crime or the trial.³⁰

C. PUBLIC TRIAL [§§ 205–216]

Research References

- ALR Digest to 3d, 4th, and Federal, Criminal Law § 113; Trial § 1
 Index to Annotations, Jury and Jury Trial; Trial; Trial by Court
 9 Federal Procedure, L Ed, Criminal Procedure §§ 22:804 et seq.
 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 63.1
 1 Am Jur Trials 303, Controlling Trial Publicity § 34
 Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) § 22.8

1. IN GENERAL [§ 205]

§ 205. Generally

Public trials are essential to the judicial system's credibility in a free society.³¹ All trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions.³²

|||| Practice guide: The guaranties of open public proceedings in criminal trials embodied in the First Amendment to the United States Constitution cover proceedings for the voir dire examination of potential jurors.³³

A public trial is not solely a private right of the parties, or even of the parties and the judge, but one involving additional interests, including those

30. 9 Federal Procedure, L Ed, Criminal Procedure § 22:809.

31. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media L R 1901.

As to the criminal defendant's constitutional right to a public trial, see 21A Am Jur 2d, Criminal Law §§ 666 et seq., 876 et seq.

Practice References: Accused's right to a public trial. 9 Federal Procedure, L Ed, Criminal Procedure §§ 22:804 et seq.

32. *Re Iowa Freedom of Information Council* (CA8 Iowa) 724 F2d 658, 10 Media LR 1120; *Oxnard Publishing Co. v Superior Court of Ventura County* (Cal App) 68 Cal Rptr 83, hear gr by sup ct, app dismd; *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media L R 1901; *Oles v Houston*, 138 Misc 2d 1075, 525 NYS2d 1008; *State v Robillard*, 146 Vt 623, 508 A2d 709, later app 147 Vt 484, 520 A2d 992.

Civil trials which pertain to the release or incarceration of prisoners and the conditions of their confinement are presumptively open to the press and public. If it is beneficial to have

public scrutiny of criminal proceedings that may result in conviction and punishment, then it is also helpful to allow public access to civil proceedings that modify the earlier trials by freeing prisoners before their sentences are completed or parole has been granted. Citizens have a legitimate interest in learning which inmates are being released from prison and the reasons why. They may reasonably want to know whether state officials are recommending the release of only those who are most deserving or those who have political or other influential connections. The type of prisoner being released may help the public in its consideration of whether to prevent overcrowding by increasing the size or number of penal facilities or by modifying criminal laws. *Newman v Graddick* (CA11 Ala) 696 F2d 796, 9 Media LR 1104.

33. *Press-Enterprise Co. v Superior Court of California*, 464 US 501, 78 L Ed 2d 629, 104 S Ct 819, 10 Media LR 1161; *Cable News Network, Inc. v United States*, 263 App DC 66, 824 F2d 1046, 14 Media LR 1334, cert den 484 US 914, 98 L Ed 2d 218, 108 S Ct 261.

of the public, which must be taken into consideration,³⁴ and implies that doors of the courtroom be kept open and that the public, or such portion thereof as may be conveniently accommodated, be admitted, subject to the right of the court to exclude objectionable characters and persons of tender years.³⁵ The right to an open public trial is a shared right of the accused under the Sixth Amendment and the public under the First Amendment.³⁶

The right of public access to proceedings is of the same significance to the public whether the case is designated civil or criminal. The public has a right to know how the civil process of the courts is functioning and whether justice is being done in specific cases.³⁷

■■■■ Observation: It has been noted that the presence of the public and press at civil proceedings will enhance and safeguard the quality of the factfinding process, just as it does at criminal trials. Arguably, the public interest in securing the integrity of the factfinding process is greater in the criminal context than the civil context, since the condemnation of the state is involved in the former but not in the latter, but it is nonetheless true that the public has a great interest in the fairness of civil proceedings.³⁸

■■■■ Caution: The availability of a trial transcript is no substitute for a public presence at the trial itself. The cold record is a very imperfect reproduction of events that transpire in the courtroom.³⁹

2. CLOSURE OF PROCEEDINGS [§§ 206–211]

§ 206. Generally

Although the right of access to criminal trials is of constitutional stature, it is not absolute.⁴⁰ The right of public access to a criminal trial must be coordinated with the constitutional right of a defendant to a fair trial. An important element in this process is insuring that the jury is always insulated, at least to the best of the court's ability, from every source of pressure or

34. *Oxnard Publishing Co. v Superior Court of Ventura County* (Cal App) 68 Cal Rptr 83, hear gr by sup ct, app dismd.

35. *United States ex rel. Orlando v Fay* (CA2 NY) 350 F2d 967, cert den 384 US 1008, 16 L Ed 2d 1021, 86 S Ct 1961; *Oxnard Publishing Co. v Superior Court of Ventura County* (Cal App) 68 Cal Rptr 83, hear gr by sup ct, app dismd; *State v Hashimoto*, 47 Hawaii 185, 389 P2d 146, reh den 47 Hawaii 344, 389 P2d 163; *Bauman v Grand T.W.R. Co.*, 363 Mich 604, 110 NW2d 628; *Fitzpatrick v St. Louis, S.F.R. Co.* (Mo) 327 SW2d 801, 80 ALR2d 825.

As long as the doors of a courtroom are open so that a reasonable proportion of the public is allowed to attend, the right to a public trial is satisfied. *Cembrook v Sterling Drug, Inc.* (1st Dist) 231 Cal App 2d 52, 41 Cal Rptr 492.

As to presence of child in court during paternity proceeding, see 10 Am Jur 2d, Bastards § 124.

36. *Press-Enterprise Co. v Superior Court of California*, 478 US 1, 92 L Ed 2d 1, 106 S Ct 2735, 13 Media LR 1001.

37. *Bauman v Grand T.W.R. Co.*, 363 Mich 604, 110 NW2d 628; *Miles v Board of Sup'rs (Miss)* 33 So 2d 810; *Oles v Houston*, 138 Misc 2d 1075, 525 NYS2d 1008; *Rea v Rea*, 195 Or 252, 245 P2d 884, 35 ALR2d 612.

38. *Re Iowa Freedom of Information Council* (CA8 Iowa) 724 F2d 658, 10 Media LR 1120 (further holding that the protection of the First Amendment therefore extends to proceedings for contempt, a hybrid containing both civil and criminal characteristics).

39. *Re Iowa Freedom of Information Council* (CA8 Iowa) 724 F2d 658, 10 Media LR 1120.

40. *Globe Newspaper Co. v Superior Court for County of Norfolk*, 457 US 596, 73 L Ed 2d 248, 102 S Ct 2613, 8 Media LR 1689 (not followed on other grounds by *Johnson Newspaper Corp. v Melino*, 77 NY2d 1, 563 NYS2d 380, 564 NE2d 1046, 18 Media LR 1551).

prejudice. Where a defendant moves to exclude members of the public from observing his jury trial, the ultimate question is whether, if the trial is left open, there is a clear likelihood that there will be irreparable damage to the defendant's right to a fair trial.⁴¹ The power to exclude the public and the press exists,⁴² but only in special circumstances or where justice requires are proceedings limited or completely closed to the public.⁴³ The circumstances under which the press and public can be barred from a criminal trial are limited, and the state's justification in denying access must be a weighty one.⁴⁴

Where the court attempts to deny access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest.⁴⁵ The court's authority to order such closure must be cautiously exercised.⁴⁶

While a defendant is entitled as of right to a public trial, he is not entitled as of right to a private trial.⁴⁷

41. *State v Franklin* (W Va) 327 SE2d 449 (further holding that where the spectators sought to be excluded were members of an anti-drunk-driving organization who were clearly distinguishable from other visitors in the courtroom by large yellow buttons on their lapels, and by the fact that they were led by the county sheriff, who was in uniform, they constituted a formidable, albeit passive, influence on the jury, and the court's cardinal failure was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty).

42. *State ex rel. Gore Newspapers Co. v Tyson* (Fla App D4) 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by *English v McCrary* (Fla) 348 So 2d 293, 2 Media LR 1903) as stated in *Miami Herald Pub. Co. v Lewis* (Fla) 426 So 2d 1, 8 Media LR 2281; *Williamson v Lacy*, 86 Me 80, 29 A 943; *State v Jackson*, 43 NJ 148, 203 A2d 1, 11 ALR3d 841, cert den 379 US 982, 13 L Ed 2d 572, 85 S Ct 690; *State v Robillard*, 146 Vt 623, 508 A2d 709, later app 147 Vt 484, 520 A2d 992; *State ex rel. Ampco Metal, Inc. v O'Neill*, 273 Wis 530, 78 NW2d 921, 62 ALR2d 501.

Practice References: Exclusion of public from courtroom. 1 Am Jur Trials 303, Controlling Trial Publicity § 34.

43. *Ex parte Balogun* (Ala) 516 So 2d 606, on remand (Ala App) 516 So 2d 614; *Sentinel Star Co. v Booth* (Fla App D2) 372 So 2d 100, 5 Media LR 1078 (disagreed with on other grounds by *Sentinel Star Co. v Edwards* (Fla App D5) 387 So 2d 367, 6 Media LR 1603, petition den (Fla) 399 So 2d 1145); *State v Robillard*, 146 Vt 623, 508 A2d 709, later app 147 Vt 484, 520 A2d 992.

Where necessary, the court in furtherance of the litigants' right to a fair trial may exclude the public and press in circumstances not un-

like those found in criminal proceedings, but then only for the most cogent reasons. *State ex rel. Gore Newspapers Co. v Tyson* (Fla App D4) 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by *English v McCrary* (Fla) 348 So 2d 293, 2 Media LR 1903) as stated in *Miami Herald Pub. Co. v Lewis* (Fla) 426 So 2d 1, 8 Media LR 2281.

Practice References: Exclusion of public from criminal proceeding. 9 Federal Procedure, L Ed, Criminal Procedure §§ 22:805, 22:806.

44. *Globe Newspaper Co. v Superior Court for County of Norfolk*, 457 US 596, 73 L Ed 2d 248, 102 S Ct 2613, 8 Media LR 1689 (not followed on other grounds by *Johnson Newspaper Corp. v Melino*, 77 NY2d 1, 563 NYS2d 380, 564 NE2d 1046, 18 Media LR 1551).

45. *Newman v Graddick* (CA11 Ala) 696 F2d 796, 9 Media LR 1104.

A state statute which, as construed by the state's highest court, required under all circumstances exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial violated the First Amendment, the statute not being justified on the basis of either the state's interest in protecting minor victims of sex crimes from further trauma and embarrassment or its interest in encouraging such victims to come forward and testify in a truthful and credible manner. *Globe Newspaper Co. v Superior Court for County of Norfolk*, 457 US 596, 73 L Ed 2d 248, 102 S Ct 2613, 8 Media LR 1689 (not followed on other grounds by *Johnson Newspaper Corp. v Melino*, 77 NY2d 1, 563 NYS2d 380, 564 NE2d 1046, 18 Media LR 1551).

46. *Sentinel Star Co. v Booth* (Fla App D2) 372 So 2d 100, 5 Media LR 1078 (disagreed with on other grounds by *Sentinel Star Co. v Edwards* (Fla App D5) 387 So 2d 367, 6 Media LR 1603, petition den (Fla) 399 So 2d 1145).

47. *Phoenix Newspapers, Inc. v Jennings*, 107

§ 207. Circumstances justifying closure

While a strong presumption of openness and judicial proceedings exists, the law has established numerous exceptions to protect competing interests. These exceptions fall into two categories: The first includes those necessary to insure order and dignity in the courtroom and the second deals with the contents of the information.⁴⁸ Closure of court proceedings or records should occur only when necessary to comply with established public policy set forth in the constitution, statutes, rules, or case law,⁴⁹

- to protect trade secrets,⁵⁰
- to protect a compelling governmental interest,⁵¹
- to obtain evidence to properly determine legal issues in the case,⁵²
- to avoid substantial injury to innocent third parties,⁵³
- or to avoid substantial injury to a party by disclosure of matters protected by a common-law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.⁵⁴

In the exercise of its inherent power, a court may limit attendance,

- to prevent overcrowding of the courtroom,⁵⁵
- to prevent disorder,⁵⁶

Ariz 557, 490 P2d 563, 1 Media LR 2404, 49 ALR3d 1000; Gannett Pacific Corp. v Richardson, 59 Hawaii 224, 580 P2d 49, 3 Media LR 2575.

48. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

49. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

50. *Re Iowa Freedom of Information Council* (CA8 Iowa) 724 F2d 658, 10 Media LR 1120; *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901; *Crain Communications, Inc. v Hughes* (1st Dept) 135 App Div 2d 351, 521 NYS2d 244, 14 Media LR 1951, app dismd without op 71 NY2d 993, 529 NYS2d 277, 524 NE2d 878 and app gr 73 NY2d 701, 536 NYS2d 743, 533 NE2d 673 and affd 74 NY2d 626, 541 NYS2d 971, 539 NE2d 1099, 16 Media LR 1623, reconsideration den 74 NY2d 843, 546 NYS2d 559, 545 NE2d 873; *State ex rel. Ampco Metal, Inc. v O'Neill*, 273 Wis 530, 78 NW2d 921, 62 ALR2d 501.

51. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

52. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

53. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

54. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

55. *Cohen v Everett City Council*, 85 Wash 2d 385, 535 P2d 801.

56. *Snyder v Coiner* (CA4 W Va) 510 F2d 224; *United States ex rel. Orlando v Fay* (CA2 NY) 350 F2d 967, cert den 384 US 1008, 16 L Ed 2d 1021, 86 S Ct 1961; *Weatherford v State* (Ala App) 369 So 2d 863, cert den (Ala) 369 So 2d 873, and cert den 444 US 867, 62 L Ed 2d 91, 100 S Ct 141; *Williams v State*, 57 Ala App 158, 326 So 2d 686, cert den 295 Ala 428, 326 So 2d 692; *Renfro v State*, 49 Ala App 713, 275 So 2d 692, later app (Ala App) 382 So 2d 627, cert den (Ala) 382 So 2d 632, post-conviction proceeding (Ala App) 551 So 2d 427, reh den (Ala App) 1989 Ala Crim App LEXIS 860 and (disapproved by Ex parte Marek (Ala) 556 So 2d 375, on remand (Ala App) 556 So 2d 383); *Bishop v State*, 19 Ala App 326, 97 So 169; *People v Buck*, 46 Cal App 2d 558, 116 P2d 160; *Commonwealth v Bohmer*, 374 Mass 368, 372 NE2d 1381; *People v Glover*, 60 NY2d 783, 469 NYS2d 677, 457 NE2d 783, cert den 466 US 975, 80 L Ed 2d 825, 104 S Ct 2353; *People v Nicholas* (3d Dept) 35 App Div 2d 18, 312 NYS2d 645; *Elrod v State* (Okla Crim) 527 P2d 208; *Commonwealth v Berrigan*, 509 Pa 118, 501 A2d 226, 55 ALR4th 1145, on remand, en banc 369 Pa Super 145, 535 A2d 91, app den 521 Pa 609, 557 A2d 341, cert den (US) 107 L Ed 2d 173, 110 S Ct 219; *State v Shaw* (Tenn Crim) 619 SW2d 546; *Cohen v Everett City Council*, 85 Wash 2d 385, 535 P2d 801; *State v Collins*, 50 Wash 2d 740, 314 P2d 660.

Annotations: Exclusion of public from state

- to avoid intimidation of witnesses,⁵⁷
- to protect the safety of undercover officers,⁵⁸
- and to prevent minors from hearing salacious testimony.⁵⁹

An exception to the public's right to attend court proceedings exists in cases in which the demands of individual privacy clearly outweigh the merits of public disclosure.⁶⁰ However, where the right to a public trial is guaranteed by the state constitution, an order excluding all spectators during the trial, except members of the bar and press, on the sole ground of the obscene nature of the offense charged and the anticipated testimony, exceeds the power of the trial court and constitutes a violation of the defendant's constitutional right to a public trial, and mere embarrassment of adult witnesses with no showing of inability to testify is not a sufficient reason to defeat an overbalancing constitutional right to a public trial.⁶¹

A trial court was held to have erred when it excluded the public and press from marriage dissolution proceedings where no theory was advanced that the

criminal trial in order to prevent disturbance by spectators or defendant, 55 ALR4th 1170 §§ 3, 4.

Tension in courtroom did not, by itself, warrant total closure of preliminary hearing in murder case, and it was arbitrary and capricious and denial of due process for court to order closure without affording newspaper opportunity to challenge closure through counsel; burden of establishing need for closure lies on defendant, in view of presumption of public access under First Amendment. *Capital Newspapers Div. of Hearst Corp. v Lee*, 136 Misc 2d 494, 518 NYS2d 900, 14 Media LR 1726, affd (3d Dept) 139 App Div 2d 31, 530 NYS2d 872, 15 Media LR 1668.

57. *United States ex rel. Laws v Yeager* (CA3 NJ) 448 F2d 74, cert den 405 US 976, 31 L Ed 2d 251, 92 S Ct 1201; *United States ex rel. Bruno v Herold* (CA2 NY) 408 F2d 125, cert den 397 US 957, 25 L Ed 2d 141, 90 S Ct 947; *United States ex rel. Orlando v Fay* (CA2 NY) 350 F2d 967, cert den 384 US 1008, 16 L Ed 2d 1021, 86 S Ct 1961; *Perez v Metz* (SD NY) 459 F Supp 1131, later proceeding (SD NY) 459 F Supp 1141, affd without op (CA2 NY) 603 F2d 214; *Butler v Smith* (SD NY) 416 F Supp 1151; *United States ex rel. Smallwood v La Valle* (ED NY) 377 F Supp 1148, affd without op (CA2 NY) 508 F2d 837, cert den 421 US 920, 43 L Ed 2d 788, 95 S Ct 1586; *Lowe v State*, 141 Ga App 433, 233 SE2d 807; *People v Rufus* (1st Dist) 104 Ill App 3d 467, 60 Ill Dec 190, 432 NE2d 1089; *Hackett v State*, 266 Ind 103, 360 NE2d 1000; *State v Raymond* (La App) 447 So 2d 51, cert den (La) 449 So 2d 1347; *Commonwealth v Stetson*, 384 Mass 545, 427 NE2d 926, 7 Media LR 2342; *People v Hagan*, 24 NY2d 395, 300 NYS2d 835, 248 NE2d 588, cert den 396 US 886, 24 L Ed 2d 161, 90 S Ct 173; *People v Morin* (4th Dept) 96 App Div 2d 1135, 467 NYS2d 450, 55

ALR4th 1191; *State v Bayless*, 48 Ohio St 2d 73, 2 Ohio Ops 3d 249, 357 NE2d 1035, vacated, in part on other grounds 438 US 911, 57 L Ed 2d 1155, 98 S Ct 3135; *Commonwealth v Burton*, 459 Pa 550, 330 A2d 833; *Commonwealth v Wright*, 255 Pa Super 512, 388 A2d 1084; *Cohen v Everett City Council*, 85 Wash 2d 385, 535 P2d 801.

Annotations: Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 ALR4th 1156 §§ 3, 4.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 ALR4th 1196.

58. *United States ex rel. Lloyd v Vincent* (CA2 NY) 520 F2d 1272, cert den 423 US 937, 46 L Ed 2d 269, 96 S Ct 296; *People v Bostick* (2d Dept) 150 App Div 2d 707, 541 NYS2d 581; *People v Tinsley* (2d Dept) 145 App Div 2d 448, 535 NYS2d 415.

Conversely, where undercover officers were no longer employed with the local police department where the offense was committed or the trial was conducted, closure of the courtroom during their testimony has been held to violate the defendants rights to a public trial. *People v Boyd* (2d Dept) 59 App Div 2d 558, 397 NYS2d 150; *People v Hinton*, 31 NY2d 71, 334 NYS2d 885, 286 NE2d 265, cert den 410 US 911, 35 L Ed 2d 273, 93 S Ct 970; *People v Castro* (1st Dept) 63 App Div 2d 891, 405 NYS2d 729.

59. *State v Nyhus*, 19 ND 326, 124 NW 71; *Cohen v Everett City Council*, 85 Wash 2d 385, 535 P2d 801.

60. *State ex rel. Great Falls Tribune Co. v Montana Eighth Judicial Dist. Court*, 238 Mont 310, 777 P2d 345, 16 Media LR 2155.

61. *State v Schmit*, 273 Minn 78, 139 NW2d 800.

parties could not be accorded a fair trial if the public and press were present or that the administration of justice would be furthered by the exclusion. The litigants presented no reasons, cogent or otherwise, for requesting that their proceedings be conducted behind closed doors. However well-intentioned the judge's motives may have been in the seating to the wishes of the litigants, it simply did not afford a sufficient predicate upon which to exclude the public and press. The court's primary concern is for the litigants and in particular for their fundamental right to a fair trial, but the personal preferences of litigants and a fair trial for litigants are two entirely different considerations. Even though litigants may prefer to have their dissolution proceeding conducted in private away from the prying eyes of the public and glare of the media, these desires cannot serve as a sufficient predicate upon which to exclude the public and press completely.⁶²

§ 208. Procedure

Before and during a closure order, the trial court is required to determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restricted closure necessary to accomplish its purpose.⁶³ If closure is warranted, the restriction on access must be narrowly drawn with only that part of the proceeding as is necessary closed. A presumption of access must be indulged to the fullest extent not incompatible with the reasons for closure.⁶⁴

Whenever an objection to closure of a hearing is made, the court must allow the objecting parties a reasonable opportunity to state their objections. This opportunity need not take the form of an evidentiary hearing or encompass extended legal argument. Where a member of the media or the public objects to a request by a party that a hearing be closed, or to a proposal by the court on its own motion that a hearing be closed, the court must give him or her a reasonable opportunity to state the objection.⁶⁵

Findings justifying closure of a hearing must be made before closure takes place.⁶⁶

§ 209. —Where trade secrets are involved

In the trade-secrets context, the requirement of prior findings justifying closure cannot be liberally applied without some modification. Trade secrets are a peculiar kind of property. Their only value consists in their being kept

62. *State ex rel. Gore Newspapers Co. v Tyson* (Fla App D4) 313 So 2d 777, 79 ALR3d 382 (disapproved on other grounds by *English v McCrary* (Fla) 348 So 2d 293, 2 Media LR 1903) as stated in *Miami Herald Pub. Co. v Lewis* (Fla) 426 So 2d 1, 8 Media LR 2281.

63. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901; *State v Robillard*, 146 Vt 623, 508 A2d 709, later app 147 Vt 484, 520 A2d 992.

64. *Newman v Graddick* (CA11 Ala) 696 F2d 796, 9 Media LR 1104.

65. *Re Iowa Freedom of Information Council* (CA8 Iowa) 724 F2d 658, 10 Media LR 1120.

66. *Re Iowa Freedom of Information Council* (CA8 Iowa) 724 F2d 658, 10 Media LR 1120; *State v Robillard*, 146 Vt 623, 508 A2d 709, later app 147 Vt 484, 520 A2d 992.

The trial court must balance the right of the public and press to attend a trial and the right of the defendant to a fair trial in determining whether to close voir dire proceedings to the public and the press, and must announce the reasons for its decision because guaranteed rights to speak and to publish concerning what takes place at trial lose meaning if access to observe a trial is foreclosed arbitrarily. *Re United States ex rel. Pulitzer Pub. Co.* (CA8) 635 F2d 676, 6 Media LR 2232.

private. If they are disclosed or revealed, they are destroyed. Therefore, it makes no sense to say that a determination whether trade secrets are involved should be made in open court, with the hearing to be later closed only if the determination is that they are involved. In order to make this very determination, the court must consider the information that one of the parties claims constitutes a trade secret, and the damage to that party that may occur if the claim secrets are revealed. As a practical matter, such a decision cannot be made without at least some limited initial in camera consideration. Such in camera consideration should be as strictly limited as possible. After initially hearing the objections to closure, the District Court, if it considers the objections not well taken, should go into in camera session, and take testimony limited strictly to the issue of the existence of trade secrets and the damage that disclosure of those secrets might cause. If it determines that secrets are involved, it should then return to the courtroom announce this determination, and state that the remainder of the proceeding will be conducted in camera. If it determines that secrets are not involved, it should of course return to the courtroom and conclude the case in open court.⁶⁷

§ 210. Standing to challenge closure; burden of proof

Both the public and news media have standing to challenge any closure order.⁶⁸ The burden of proof in these proceedings is on the party seeking closure.⁶⁹ The presumption of openness continues through the appellate review process, and the parties seeking closure continue to have the burden to justify closure.⁷⁰

■■■■ Observation: This heavy burden is placed on the party seeking closure not only because of the strong presumption of openness but also because those challenging the order will generally have little or no knowledge of the specific grounds requiring closure.⁷¹

§ 211. Review of closure order

Orders denying press access to ongoing litigation are appealable under the collateral order doctrine. The denial of review until the District Court proceedings are concluded could irreparably harm the press's ability to contemporaneously cover judicial proceedings of significant public interest.⁷²

The standard to be implied in determining whether there is a sufficient record to support a trial judge's finding that grounds exist to exclude spectators from a courtroom is whether there has been an abuse of discretion.⁷³

67. *Re Iowa Freedom of Information Council* (CA8 Iowa) 724 F2d 658, 10 Media LR 1120.

68. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901; *Oles v Houston*, 138 Misc 2d 1075, 525 NYS2d 1008.

69. *Nebraska Press Asso. v Stuart*, 427 US 539, 49 L Ed 2d 683, 96 S Ct 2791, 1 Media LR 1064; *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

70. *Barron v Florida Freedom Newspapers,*

Inc. (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

71. *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media LR 1901.

72. *Newman v Graddick* (CA11 Ala) 696 F2d 796, 9 Media LR 1104.

Forms: Petition or application—For relief by special action—Vacate order of exclusion of general public from preliminary hearing. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 63.1.

73. *United States v Rios Ruiz* (CA1 Puerto Rico) 579 F2d 670, 3 Fed Rules Evid Serv 64, 48 ALR Fed 911.

3. PRESS ACCESS TO JUDICIAL PROCEEDINGS [§§ 212-216]

§ 212. Generally

It is generally recognized that the right of the media to observe and report judicial proceedings is not a special privilege but rather is equivalent to the right of the public in general to have open access to public trials.⁷⁴ The public and the press have the right under state law to attend and observe with limited exception the hearings of the courts of the state. The press also enjoys this right through its individual representatives and because of its surrogate role for the public.⁷⁵

The courtroom and courthouse premises are subject to the control of the court, and courts may impose restrictions upon media access to courtrooms and courthouse premises when necessary to protect and facilitate the proper administration of the judicial system.⁷⁶ The presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged, and the number of reporters in the courtroom should be limited at the first sign that their presence will disrupt the trial.⁷⁷

There is a presumption that all civil proceedings, absent compelling reasons, should be open to the media for audio-visual coverage so long as it can be done within the confines of proper decorum and without harm to specifically protected rights.⁷⁸

§ 213. —Broadcast media

There is no constitutional right to broadcast, record, or photograph court proceedings.⁷⁹ There is no constitutional right to have live witness testimony

74. *Oxnard Publishing Co. v Superior Court of Ventura County* (Cal App) 68 Cal Rptr 83, hear gr by sup ct, app dismd; *Gannett Pacific Corp. v Richardson*, 59 Hawaii 224, 580 P2d 49, 3 Media LR 2575; *Cohen v Everett City Council*, 85 Wash 2d 385, 535 P2d 801.

Representatives of the press have no special standing to apply for a writ of mandate to compel a court to permit them to attend a trial. *Sheppard v Maxwell*, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media LR 1220; *Oxnard Publishing Co. v Superior Court of Ventura County* (Cal App) 68 Cal Rptr 83, hear gr by sup ct, app dismd.

75. *State ex rel. Great Falls Tribune Co. v Montana Eighth Judicial Dist. Court*, 238 Mont 310, 777 P2d 345, 16 Media LR 2155.

76. *Combined Communications Corp. v Fine-silver* (CA10) 672 F2d 818, 8 Media LR 1233 (further holding that the application of a local rule prohibiting television cameras in the courthouse to prevent television coverage of a meeting conducted in the courthouse pursuant to court order did not infringe upon the First Amendment rights of the television station).

77. *Sheppard v Maxwell*, 384 US 333, 16 L Ed

2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media LR 1220.

A defendant in a criminal proceeding should not be forced to run a gauntlet of reporters and photographers each time he enters or leaves the courtroom. *Seymour v United States* (CA5 Tex) 373 F2d 629.

Massive intrusion of representatives of the news media into the trial itself can so alter or destroy the constitutionally necessary judicial atmosphere and decorum that the requirements of impartiality imposed by due process of law are denied the defendant. *Hilliard v Arizona* (CA9 Ariz) 362 F2d 908.

78. *Oles v Houston*, 135 Misc 2d 1075, 525 NYS2d 1008.

79. *Van Orden v Indiana*, 471 US 1104, 85 L Ed 2d 851, 105 S Ct 2335; *Estes v Texas* (1965) 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628, 1 Media LR 1187, reh den 382 US 875, 15 L Ed 118, 86 S Ct 18 and (diverged from by *Chandler v Florida*, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media LR 1041) as stated in *State v Hovey*, 106 NM 512, 742 P2d 512; *Conway v United States* (CA6 Ohio) 852 F2d 187, 15 Media LR 1967, cert den 488 US 943, 102 L Ed 2d 359, 109 S Ct 370; *Westmoreland v Columbia Broadcasting System, Inc.* (CA2 NY) 752 F2d 16, 11 Media LR 1013, 40 FR

recorded and broadcast. While the guaranty of a public trial is a safeguard against any attempt to employ the courts as instruments of persecution, it confers no special benefit on the press, nor does the Sixth Amendment require that the trial, or any part of it, be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.⁸⁰ Conversely, the Supreme Court's opinion in *Estes*,⁸¹ in which it was held that, in view of the great notoriety of the trial, the accused was denied due process of law by the televising and broadcasting of the proceedings, is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and which continues to change.⁸²

Notwithstanding the objection of the accused and absent a showing of prejudice of constitutional dimensions, a state may, consistently with the constitutional guaranties of due process, experiment with a program which permits electronic media and still photographic coverage of public judicial proceedings in the appellate and trial courts of the state subject at all times to the authority of the presiding judge, and in accordance with guidelines placing upon trial judges positive obligations to be on guard to protect the fundamental right of the accused to a fair trial.⁸³

Serv 2d 759, cert den 472 US 1017, 87 L Ed 2d 614, 105 S Ct 3478; *United States v Yonkers Bd. of Education* (CA2 NY) 747 F2d 111, 10 Media LR 2521, 40 FR Serv 2d 426; *Combined Communications Corp. v Finesilver* (CA10) 672 F2d 818, 8 Media LR 1233; *Dorfman v Meiszner* (CA7 Ill) 430 F2d 558, 1 Media LR 2396; *United States v Webbe* (ED Mo) 652 F Supp 18, affd (CA8 Mo) 791 F2d 103, 12 Media LR 2193 (disagreed with on other grounds by Re Search Warrant for Secretarial Area Outside Office of Gunn (CA8 Mo) 855 F2d 569, 15 Media LR 1969); *Tribune Review Publishing Co. v Thomas* (DC Pa) 153 F Supp 486, affd (CA3 Pa) 254 F2d 883; *Re Petition of Arkansas Bar Asso.*, 271 Ark 358, 609 SW2d 28, 6 Media LR 2278, mod on other grounds 275 Ark 495, 628 SW2d 573, 8 Media LR 1360; *Tribe v District Court of County of Larimer*, 197 Colo 433, 593 P2d 1369; *Re Petition of Post-Newsweek Stations, Inc.* (Fla) 370 So2d 764, 5 Media LR 1039, 14 ALR4th 82; *Brumfield v State* (Fla) 108 So 2d 33; *Ex parte Sturm*, 152 Md 114, 136 A 312, 51 ALR 356 (superseded by statute on other grounds as stated in *Billman v Maryland Deposit Ins. Fund Corp.*, 312 Md 128, 538 A2d 1172); *State v Clifford*, 162 Ohio St 370, 55 Ohio Ops 217, 123 NE2d 8, cert den 349 US 929, 99 L Ed 1259, 75 S Ct 771; *Cody v State* (Okla Crim) 361 P2d 307, 84 ALR2d 997, later app (Okla Crim) 376 P2d 625; *Re Mack*, 386 Pa 251, 126 A2d 679, cert den 352 US 1002, 1 L Ed 2d 547, 77 S Ct 559; *Re Extension of Media Coverage for Further Experimental Period* (RI) 472 A2d 1232, 10 Media LR 1803, later proceeding (RI) 539 A2d 976, 15 Media LR 1473.

As to the effect of the presence of cameras in the courtroom on an accused's right to a fair trial, see § 198.

As to the right of the press to access to information under the First Amendment, see 16A Am Jur 2d, Constitutional Law § 504.

Annotations: Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 ALR4th 121 §§ 3, 4.

80. *Nixon v Warner Communications, Inc.*, 435 US 589, 55 L Ed 2d 570, 98 S Ct 1306, 3 Media LR 2074.

The First Amendment does not guarantee a positive right to televise or broadcast criminal trials. Holding that television coverage is not always constitutionally prohibited is a far cry from suggesting that television coverage is ever constitutionally mandated. *United States v Edwards* (CA5 La) 785 F2d 1293, 12 Media LR 1997.

81. *Estes v Texas*, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628, 1 Media LR 1187, reh den 382 US 875, 15 L Ed 2d 118, 86 S Ct 18 and (diverged from by *Chandler v Florida*, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media LR 1041) as stated in *State v Hovey*, 106 NM 512, 742 P2d 512.

82. *Chandler v Florida*, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media LR 1041.

83. *Chandler v Florida*, 449 US 560, 66 L Ed

Generally speaking, the propriety of granting or denying permission to the media to broadcast, record, or photograph court proceedings involves weighing the constitutional guaranties of freedom of the press and the right to a public trial on the one hand and, on the other hand, the due process rights of the defendant and the power of the courts to control the proceedings in order to permit the fair and impartial administration of justice. The courts also generally agree that the constitutional right to a public trial does not entitle the press to broadcast, record, or photograph court proceedings, because the right to a public trial is primarily for the benefit of the defendant, and because the requirement of a public trial is satisfied when members of the press and public are permitted to attend a trial and to report what transpires.⁸⁴

A claim that every newspaper, radio, and television reporter has an absolute right under the First Amendment to enter any public proceeding, presumably either legislative, executive, or judicial, and record whatever occurs, by means of a television camera, a still camera, a microphone, a tape recorder, a typewriter, or anything else, unless an objecting party shows by clear and convincing evidence a compelling reason for a curtailment of the reporter's activity, has been rejected.⁸⁵

§ 214. Restrictions on electronic media access to proceedings

In some jurisdictions, the presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such a fact will be qualitatively different from coverage by other types of media.⁸⁶ This qualitatively different test gives the trial judge definitive guidelines by which he is allowed to exclude electronic media from court proceedings. The trial judges' discretionary authority in this regard is analogous to the authority trial judges have traditionally applied in cases where special injury and special damages arise resulting from public disclosure of confidential informants, trade secrets, and details of child custody proceedings. Any general effect resulting from public notoriety of the case will not suffice to trigger electronic media exclusion. Wider dissemination of information concerning judicial proceedings is not a reason to exclude the camera from the courtroom.⁸⁷

■■■■ Observation: It has been noted that local knowledge of the proceedings will be no greater proportionately with electronic media than when this country was primarily agrarian and common-place court attendance resulted in widespread knowledge of courtroom proceedings. As our society has become more complex and urbanized, more citizens have become dependent on the media for courtroom knowledge rather than

2d 740, 101 S Ct 802, 7 Media LR 1041; *Cody v State* (Okla Crim) 361 P2d 307, 84 ALR2d 997, later app (Okla Crim) 376 P2d 625.

84. *State v McNaught*, 238 Kan 567, 713 P2d 457, 12 Media LR 1890.

85. *KARK-TV Channel 4, Inc. v Lofton*, 277 Ark 228, 640 SW2d 798, 9 Media LR 1016.

86. *State v Green* (Fla) 395 So 2d 532, 7 Media LR 1025, on remand (Fla 11th Cir Ct) 7

Media LR 1884; *Re Petition of Post-Newsweek Stations, Inc.* (Fla) 370 So 2d 764, 5 Media LR 1039, 14 ALR4th 82.

Law Reviews: *Platte, TV in the Courtrooms: Right of Access?* 3 Com Law 11, Winter, 1981.

87. *State v Green* (Fla) 395 So 2d 532, 7 Media LR 1025, on remand (Fla 11th Cir Ct) 7 Media LR 1884.

actual observation. The camera's physical presence in the courtroom once again allows, to a limited extent, personal observation of the judicial process.⁸⁸

It should be recognized that the qualitatively different test has constitutional dimensions when applied to a criminal defendant because the constitutional right to a fair trial is at issue. Given this factor, a different quantum of proof applies to a criminal defendant as compared to all other trial participants. The general trial participant must clearly show some special and identifiable injury from the presence of the camera and electronic media under the test. However, the criminal defendant has a two-fold opportunity to either show that there is a reasonable and substantial likelihood that an identifiable prejudice to the right of fair trial will result from the presence of electronic media under the test or the same special or identifiable injury as other trial participants. In all instances, a showing must be made that the prejudice or the special injury resulted solely from the presence of electronic media in the courtroom in a manner which is qualitatively different from that caused by traditional media coverage.⁸⁹

§ 215. —Coverage of particular witness' testimony

Affidavits are sufficient to ground a trial court's determination that electronic media should be prohibited from covering the testimony of a particular witness.⁹⁰ Indeed, a ruling can be supported by matters within the judicial knowledge of the trial judge, provided they are identified on the record and counsel is given an opportunity to refute or challenge them. The dangers of in-prison violence, for example, may well be a matter which can be judicially noticed, particularly in a criminal prosecution for a jail house murder. In short, the evidentiary showing which must ground an exclusionary ruling is both simple and traditional. Affidavits are adequate for this purpose, as in other types of hearings.⁹¹

A bare assertion of fear by a prisoner may, but ordinarily should not, be sufficient to justify the exclusion of the electronic media coverage of his testimony, where media representatives are not allowed by time or circumstances to test by cross-examination the prisoner's fear of reprisal. The important point of the exclusionary inquiry is not whether the inmate's fear is justified. The key issue is whether the state and the defendant will be able to proceed to trial under circumstances which allow each to develop its case fully. The interest of the justice system in proceedings is to set the procedural stage for a fair determination of the trial issues, and that interest overshadows any concern as to the reasonableness of the subjective state of mind of any individual witness. The trial judge in these peculiar exclusionary proceedings must satisfy himself that there is some adverse effect, or potential effect, on the proceeding due to the qualitative difference between the electronic media coverage and other forms of trial recording. Stated another way, the issue in these hearings is collateral to the rights of the state and the defendant to a fair

88. *State v Green* (Fla) 395 So 2d 532, 7 Media LR 1025, on remand (Fla 11th Cir Ct) 7 Media LR 1884.

90. *State v Palm Beach Newspapers, Inc.* (Fla) 395 So 2d 544, 7 Media LR 1021.

89. *State v Green* (Fla) 395 So 2d 532, 7 Media LR 1025, on remand (Fla 11th Cir Ct) 7

91. *State v Palm Beach Newspapers, Inc.* (Fla) 395 So 2d 544, 7 Media LR 1021.

trial, rights which include the opportunity to present live witness testimony deemed by counsel to be indispensable.⁹²

§ 216. Hearing

The procedural process which necessarily follows from the trial judge's discretionary authority and from applying the qualitatively different test requires an expeditious hearing in all cases where proper motions to exclude the electronic media are presented. A proper motion should set forth facts that, if proved, would justify the entry of a restrictive order. General assertions or allegations are insufficient. The trial court must allow the affected media to participate in the hearing although all parties must recognize that these proceedings are collateral and, as such, should not unnecessarily delay the main proceeding, particularly in criminal matters where the right to speedy trial may be adversely affected.⁹³

An evidentiary hearing should be allowed in all cases to elicit relevant facts if these points are made an issue, provided demands for time or proof do not unreasonably disrupt the main trial proceeding. For example, going to the issue of less restrictive means, it might be relevant to an exclusionary ruling concerning a prisoner-witness, and a proffer of proof might be made, to show the ease or difficulty with which prison officials may curtail inmate access to particular forms of electronic media coverage.⁹⁴

D. PERSONS PRESENT [§§ 217-257]

Research References

ALR Digest to 3d, 4th, and Federal, Criminal Law §§ 118, 118.5, 119

Index to Annotations, Instructions to Jury; Jury and Jury Trial; Trial; Trial by Court; Verdict

9 Federal Procedure, L Ed, Criminal Procedure § 22:813

15 Am Jur Pl & Pr Forms (Rev), Judges, Forms 111-115; 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 61, 63, 64

1 Am Jur Trials 303, Controlling Trial Publicity § 36; 5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases §§ 58, 59; 5 Am Jur Trials 611, Presenting Plaintiff's Case § 19; 7 Am Jur Trials 477, Homicide § 132; 14 Am Jur Trials 101, Glass Door Accidents § 50; 14 Am Jur Trials 619, Juvenile Court Proceedings §§ 26-30, 55

Danner & Toothman, Trial Practice Checklists (1989), § 8:20

Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990), § 22:7

1. JUDGE [§§ 217-223]

§ 217. Generally

It is well settled that it is the duty of the presiding judge to be present at all

92. State v Palm Beach Newspapers, Inc. (Fla) 395 So 2d 544, 7 Media LR 1021.

Media LR 1025, on remand (Fla 11th Cir Ct) 7 Media LR 1884.

93. State v Green (Fla) 395 So 2d 532, 7

94. State v Palm Beach Newspapers, Inc. (Fla) 395 So 2d 544, 7 Media LR 1021.

stages of a criminal proceeding.⁹⁵ The presence of a judge, who will insure the proper conduct of a trial, is essential to the criminal defendant's guaranty of a trial by an impartial jury.⁹⁶

Similarly, many courts have recognized that the absence of the trial judge from the courtroom at any stage of a civil jury trial prior to the deliberation of the jury, or, in a nonjury trial, prior to the completion of the closing argument of counsel, is improper.⁹⁷

Courts condemn the act of a trial judge absenting himself during any stage of trial proceedings,⁹⁸ although the judge's absence has been found harmless when the judge remained in effective control.⁹⁹ A judge's physical absence from the courtroom has been said to render proper control of the entire trial procedure an impossibility.¹ Thus, it is simply inadequate to substitute for the judge's personal presence a television monitor which allows view of the defendant, the jury, the clerk, and the reporter. The spectator section and any area behind the video camera are outside the lens' scope. In such circumstances, a judge could not observe any prejudicial gestures or inappropriate activities on the part of spectators. Nor is it likely that a judge could hear any improper mutterings in response to ongoing testimony, since not even those persons within camera range have microphones.²

If it becomes necessary for the trial judge in a criminal case to leave the courtroom temporarily, the proper practice for him to follow is to announce his intention, suspend the trial, and declare a recess.³

§ 218. —Particular stages of trial

The judge should be present during the questioning and selection of a jury. There is a possibility of prejudice where the judge is absent from the jury selection. Jury selection is an active process involving considerable discourse between counsel and veniremen. If a party exceeds the bounds of proper examination or misstates the law, a judge can immediately alleviate the

95. *Carter v State* (Fla App D3) 512 So 2d 284, 12 FLW 2157; *Peri v State* (Fla App D3) 426 So 2d 1021, 39 ALR4th 454, review den (Fla) 436 So 2d 100; *Shular v State*, 105 Ind 289, 4 NE 870 (disapproved on other grounds by *New York, C. & S.L.R. Co. v Shriner*, 239 Ind 626, 158 NE2d 157, reh den 239 Ind 635, 159 NE2d 574); *People v Morehouse*, 328 Mich 689, 44 NW2d 830, 34 ALR2d 676, cert den 341 US 922, 95 L Ed 1355, 71 S Ct 739; *State v Darrow*, 56 ND 334, 217 NW 519; *State v McIver*, 238 SC 401, 120 SE2d 393; *Bright v State*, 165 Tex Crim 291, 306 SW2d 899; *State v Demars*, 101 Vt 229, 143 A 311, 62 ALR 1464.

As to presence of judge at view, see § 266.

As to the presence of the trial judge at the receipt and recordination of the verdict, see § 1174.

96. *Brown v State* (Fla) 538 So 2d 833, 14 FLW 53.

97. *Capital Traction Co. v Hof*, 174 US 1, 43 L Ed 873, 19 S Ct 580; *Scott v Angie's, Inc.*, 153 Mich App 652, 396 NW2d 429, app den

426 Mich 886; *Carpenter v Carpenter*, 78 NH 440, 101 A 628; *Bobbitt v Maher Beverage Co.*, 152 Ohio St 246, 40 Ohio Ops 290, 89 NE2d 583; *Frangos v Edmunds*, 179 Or 577, 173 P2d 596; *Caesar v Wegner*, 262 Wis 429, 55 NW2d 371.

Annotations: Absence of judge from courtroom during trial of civil case, 25 ALR3d 637 § 3.

98. *Carter v State* (Fla App D3) 512 So 2d 284, 12 FLW 2157; *Hall v State* (Ind) 497 NE2d 916.

As to absence of judge as ground for new trial, see 58 Am Jur 2d, New Trial § 108.

99. *Hall v State* (Ind) 497 NE2d 916.

1. *Commonwealth v Bergstrom*, 402 Mass 534, 524 NE2d 366.

2. *Commonwealth v Bergstrom*, 402 Mass 534, 524 NE2d 366.

3. *Heffin v United States* (CA5 Fla) 125 F2d 700, cert den 316 US 687, 86 L Ed 1759, 62 S Ct 1276; *State v Hinton*, 210 SC 480, 43 SE2d 360.

prejudice by means of a curative instruction. A judge cannot fulfill this responsibility if he or she is absent.⁴ No questioning of prospective jurors in a criminal case may take place outside of the presence of a trial judge. This requirement cannot be waived by anyone, including a defendant. The expediency of juror selection outside the presence of a judge must yield to judicial supervision of all questioning and the exercise of peremptory challenges.⁵

A trial judge's physical absence from the courtroom during the reading of depositions has been held erroneous.⁶

Statutory language providing that on application of a party a judge shall be present at the examination of the jurors is mandatory and if the judge to whom the application is made cannot attend, it is incumbent upon judge to insure that the moving party's statutory right is not frustrated by arranging for another judge to be present.⁷

§ 219. Objection to absence; waiver of irregularity

The authorities are not in agreement on the issue of the effect of a failure to object to a judge's absence, or on the question whether the right to have the judge present at all stages of the proceeding may be waived. According to some courts, the defendant in a criminal case may consent, or waive objection, to the temporary absence of the judge from the courtroom,⁸ but the consent of counsel to the absence of the judge is not binding on the party claiming error.⁹

There is some authority to the effect that in order for the absence of the presiding judge from the courtroom during a trial to be reversible error, the complaining party must object to his absence.¹⁰ Elsewhere, however, it has been held that a waiver of the trial judge's presence cannot be implied because of a defendant's failure to make a timely objection,¹¹ and a judge cannot absent himself or herself from the proceedings over a defendant's objection.¹²

In federal court, the right to have an Article III judge preside at the impanelment of a felony jury may be waived.¹³

4. *State v Singletary* (Fla) 549 So 2d 996, 14 FLW 413.

5. *State v Singletary* (Fla) 549 So 2d 996, 14 FLW 413.

As to waiver of objection to judge's absence, see § 219.

6. *Scott v Angie's, Inc.*, 153 Mich App 652, 396 NW2d 429, app den 426 Mich 886.

7. *Baginski v New York Tel. Co.* (1st Dept) 130 App Div 2d 362, 515 NYS2d 33.

Defendant's statutory right to have a judge present at the examination of jurors was violated where the court assigned a law assistant to supervise the voir dire and later presided himself at the selection. *Guarnier v American Dredging Co.* (1st Dept) 145 App Div 2d 341, 535 NYS2d 705.

8. *Taylor v United States* (ED Pa) 386 F Supp 132, affd without op (CA3 Pa) 521 F2d 1399; *Powers v State*, 75 Neb 226, 106 NW 332.

Annotations: Absence of judge from courtroom during criminal trial prior to time of reception of verdict, 34 ALR2d 683 § 8.

9. *Ellerbe v State*, 75 Miss 522, 22 So 950; *Frangos v Edmunds*, 179 Or 577, 173 P2d 596.

10. *Re Michigan State Highway Control, etc.*, 377 Mich 309, 140 NW2d 500, 25 ALR3d 631; *People v Morehouse*, 328 Mich 689, 44 NW2d 830, 34 ALR2d 676, cert den 341 US 922, 95 L Ed 1355, 71 S Ct 739; *Tingue v State*, 90 Ohio St 368, 108 NE 222; *Grant v State* (Okla Crim) 385 P2d 925; *State v McIver*, 238 SC 401, 120 SE2d 393.

11. *Brown v State* (Fla) 538 So 2d 833, 14 FLW 53; *McCollum v State* (Fla) 74 So 2d 74, 47 ALR2d 1218; *State v Darrow*, 56 ND 334, 217 NW 519.

12. *Brown v State* (Fla) 538 So 2d 833, 14 FLW 53.

13. *United States v Lopez-Pena* (CA1 Puerto

§ 220. Prejudice resulting from absence; harmless error

Not every absence of a trial judge in a criminal case will result in a mistrial, new trial, or reversal, since it must appear from all the circumstances that the rights of the defendant were materially and detrimentally affected by the judge's misconduct,¹⁴ the test being whether, by his absence, the judge lost control of the conduct of the trial.¹⁵ Under this test, the presence of the judge out of sight of counsel, but within hearing, is not subject to objection.¹⁶

Factors which appear to be of prime importance in determining the prejudicial character of an absence of the trial judge during a criminal trial are the physical situation of the courtroom. Many cases support the conclusion that if a trial judge, although technically not in the courtroom, can see and hear the proceedings therein, his absence will not be regarded as prejudicial to the defendant.¹⁷ If, on the other hand, the absence is so complete as to result in the trial being beyond the judge's sight or hearing, the misconduct is to be regarded as prejudicial.¹⁸

Judicial absences during the taking of evidence¹⁹ have been held to involve either harmless error or a waiver under the circumstances of the particular cases. Similarly, although there is authority to the contrary,²⁰ absences during the arguments of counsel have generally been held not to require reversal.²¹

§ 221. Substitution of judges

When a trial judge is unable to act by reason of absence, death, sickness, or other disability, a substitute judge is permitted to rule on a variety of motions.²² The practice of allowing a substitute judge to enter a case after proceedings have begun should not be followed except under extraordinary

Rico) 912 F2d 1542, different results reached on reh, en banc (CA1 Puerto Rico) 912 F2d 1552.

14. *Stirone v United States* (CA3 Pa) 341 F2d 253, cert den 381 US 902, 14 L Ed 2d 284, 85 S Ct 1446; *Ex parte Ellis*, 42 Ala App 236, 159 So 2d 862; *People v Morehouse*, 328 Mich 689, 44 NW2d 830, 34 ALR2d 676, cert den 341 US 922, 95 L Ed 1355, 71 S Ct 739; *Grant v State* (Okla Crim) 385 P2d 925; *State v McIver*, 238 SC 401, 120 SE2d 393; *Cravens v State*, 55 Tex Crim 519, 117 SW 156; *Scott v State*, 47 Tex Crim 568, 85 SW 1060.

Annotations: Absence of judge from courtroom during criminal trial prior to time of reception of verdict, 34 ALR2d 683 § 2.

15. *United States v Richmond* (CA3 Pa) 17 F2d 28; *Moore v State* (Athens Co) 46 Ohio App 433, 16 Ohio L Abs 287, 188 NE 881, motion overr.

16. *Skaggs v State*, 88 Ark 62, 113 SW 346.

17. *People v Bolton*, 324 Ill 322, 155 NE 310; *Rogers v J.C. Penney Co.*, 127 Neb 885, 257 NW 252; *Bobbitt v Maher Beverage Co.*, 152 Ohio St 246, 40 Ohio Ops 290, 89 NE2d 583.

18. *Ridenour v State*, 94 Okla Crim 92, 231 P2d 395.

19. *Chicago C.R. Co. v Anderson*, 193 Ill 9, 61 NE 999; *Seley v G.D. Searle & Co.*, 67 Ohio St 2d 192, 21 Ohio Ops 3d 121, 423 NE2d 831, CCH Prod Liab Rep ¶9025; *Stratso v Song* (Franklin Co) 17 Ohio App 3d 39, 17 Ohio BR 93, 477 NE2d 1176, motion overr (disapproved on other grounds by *Albain v Flower Hosp.*, 50 Ohio St 3d 251, 553 NE2d 1038).

Annotations: Absence of judge from courtroom during trial of civil case, 25 ALR3d 637 § 8.

20. *Aronson v Bass*, 224 App Div 667, 229 NYS 201; *Snodgrass v Charleston Nugrape Co.*, 113 W Va 748, 169 SE 406; *Caesar v Wegner*, 262 Wis 429, 55 NW2d 371.

Annotations: 25 ALR3d 637 § 9[b].

21. *Dulaney v Sebastian's Adm'r.*, 239 Ky 577, 39 SW2d 1000; *Wolfe v Granover*, 249 Mich 626, 229 NW 617; *O'Connor v Bonney*, 57 SD 134, 231 NW 521.

Annotations: 25 ALR3d 637 § 9[a].

22. *State v Donovan*, 120 NH 603, 419 A2d 1102 (further holding that there was no inherent danger in permitting a substitute judge to rule on a motion to interrogate the jury after the verdict had been returned).

circumstances,²³ and only where the substitute judge becomes completely familiar with the entire case.²⁴ The more the case depends on the credibility, and especially the demeanor of the witnesses, the more a substitute judge needs to do to become adequately familiar with it. Becoming adequately familiar does not always require the reading of a transcript, although a transcript will often be helpful, and sometimes essential.²⁵

■■■■ **Practice guide:** If a substitution of judges becomes necessary, the new judge should certify that he has familiarized himself with the record of the trial.²⁶

The fact that a judge other than the one who heard the matter signed an order of revocation of probation did not operate to the prejudice of the defendant as it did no more than to carry into effect the ruling which the trial judge who heard the matter had made and pronounced in open court.²⁷

§ 222. —At particular stages of proceedings

There may properly be a substitution of judges in the preliminary stages of the trial, before any evidence has been received, the theory apparently being that the rule against substitution is designed to ensure that the judge who hears the testimony as to the facts also applies the law thereto.²⁸ Substitution of a judge after the jury has been sworn, but before the introduction of evidence, is not prejudicial to the defendant.²⁹ According to some authorities, a substitution of judges is not ground for reversal where it occurs during the impaneling of a jury,³⁰ during the introduction of evidence,³¹ during argument

As to special and substitute judges, generally, see 46 Am Jur 2d, Judges §§ 248 et seq.

23. *State v Wallen* (App) 114 Ariz 355, 560 P2d 1262; *State v McKinley* (Cuyahoga Co) 7 Ohio App 3d 255, 7 Ohio BR 335, 455 NE2d 503, motion dismd; *Commonwealth v Thompson*, 328 Pa 27, 195 A 115, 114 ALR 432.

It is not the best practice to have a substitute judge preside over part of an ongoing trial. However, in some extraordinary situations, it may be necessary. *State v Amarillas*, 141 Ariz 620, 688 P2d 628.

Forms: Affidavit—affirming disability of judge and requesting designation of substitute judge. 15 Am Jur Pl & Pr Forms (Rev), Judges, Form 111.

Affidavit—Affirming recovery of disabled judge and requesting order compelling resumption of judicial duties. 15 Am Jur Pl & Pr Forms (Rev), Judges, Form 112.

Certificate—by judge—disability due to absence—designation of special judge. 15 Am Jur Pl & Pr Forms (Rev), Judges, Form 113.

Order—substituting pro tem judge for disabled judge. 15 Am Jur Pl & Pr Forms (Rev), Judges, Form 114.

Order—revoking order to substitute judge—recovery of disabled judge. 15 Am Jur Pl & Pr Forms (Rev), Judges, Form 115.

24. *State v Wallen* (App) 114 Ariz 355, 560 P2d 1262.

25. *United States v Larios* (CA9 Wash) 640 F2d 938, 7 Fed Rules Evid Serv 1543.

26. *United States v Santos* (CA9 Guam) 588 F2d 1300, cert den 441 US 906, 60 L Ed 2d 374, 99 S Ct 1994.

27. *Peeples v State* (Fla App D3) 331 So 2d 365.

28. *Jones v State*, 57 Ala App 275, 327 So 2d 913, cert den 295 Ala 409, 327 So 2d 915.

29. *Jones v State*, 57 Ala App 275, 327 So 2d 913, cert den 295 Ala 409, 327 So 2d 915; *State v Wallen* (App) 114 Ariz 355, 560 P2d 1262; *Commonwealth v Zeger*, 200 Pa Super 92, 186 A2d 922; *Bellah v State* (Tex Crim) 415 SW2d 418.

30. *State v Amarillas*, 141 Ariz 620, 688 P2d 628; *Commonwealth v Thompson*, 328 Pa 27, 195 A 115, 114 ALR 432.

Annotations: Substitution of judge in criminal case, 83 ALR2d 1032 § 2[b].

31. *Journigan v State*, 223 Md 405, 164 A2d 896, 83 ALR2d 1026, cert den 365 US 853, 5 L Ed 2d 817, 81 S Ct 818; *State v McKinley* (Cuyahoga Co) 7 Ohio App 3d 255, 7 Ohio BR 335, 455 NE2d 503, motion dismd.

However, contrary authority also exists.

of counsel,³² or after retirement of the jury.³³ However, contrary authority also exists.³⁴

While in some cases the reception of a verdict by a judge other than the trial judge has been characterized as very irregular,³⁵ in other instances this act has been regarded as routine matter not requiring the presence of the trial judge,³⁶ especially where the complaining party consented thereto.³⁷

A judge who is substituted in the place of the presiding judge after the jury's verdict has been returned, may hear and determine a motion for new trial or in arrest of judgment,³⁸ and a judge who is substituted in a criminal case at a stage in the proceedings where his only duty is to impose sentence has proper jurisdiction to act in this regard.³⁹ In some circumstances, a case

Commonwealth v Zeger, 200 Pa Super 92, 186 A2d 922; *Bailey v State* (Ind App) 397 NE2d 1024; *State v Davis* (Mo) 564 SW2d 876; *Commonwealth v Zeger*, 200 Pa Super 92, 186 A2d 922.

Annotations: 83 ALR2d 1032 § 2[c].

32. *York v State*, 91 Ark 582, 121 SW 1070.

However, authority to the contrary may also be found. *Durden v People*, 192 Ill 493, 61 NE 317.

Annotations: 83 ALR2d 1032 § 2[d].

33. *Halko v State* (Sup) 54 Del 180, 175 A2d 42; *People v Moon* (5th Dist) 107 Ill App 3d 568, 63 Ill Dec 174, 437 NE2d 823; *Eagan v State* (Ind) 480 NE2d 946, habeas corpus proceeding (CA7 Ind) 843 F2d 1554, motion gr, cert gr 488 US 888, 102 L Ed 2d 209, 109 S Ct 218, motion gr 488 US 921, 102 L Ed 2d 321, 109 S Ct 301 and motion gr 488 US 1002, 102 L Ed 2d 771, 109 S Ct 778 and revd, en banc 492 US 195, 106 L Ed 2d 166, 109 S Ct 2875; *Medina v State* (Tex App Fort Worth) 743 SW2d 950, petition for discretionary review ref (Apr 6, 1988).

Annotations: 83 ALR2d 1032 § 2[e].

34. *Henderson v State*, 95 Okla Crim 342, 246 P2d 393; *State v Gossett*, 11 Wash App 864, 527 P2d 91.

35. *State v Finder*, 12 SD 423, 81 NW 959.

Annotations: 83 ALR2d 1032 § 2[e].

36. *Peterson v State*, 203 Kan 959, 457 P2d 6; *People v Clyburn*, 55 Mich App 454, 222 NW2d 775; *Commonwealth v Thompson*, 328 Pa 27, 195 A 115, 114 ALR 432.

Annotations: 83 ALR2d 1032 § 2[e].

37. *Johnson v Green*, 153 Mont 251, 456 P2d 290.

38. *Connelly v United States* (CA8 Mo) 249 F2d 576, 57-2 USTC ¶ 10029, 52 AFTR 891, cert den 356 US 921, 2 L Ed 2d 716, 78 S Ct 700, reh den 356 US 964, 2 L Ed 2d 1072, 78 S Ct 991 and cert den 356 US 921, 2 L Ed 2d

716, 78 S Ct 701, reh den 356 US 964, 2 L Ed 2d 1072, 78 S Ct 991; *Konrad v State* (Alaska App) 763 P2d 1369; *State v Leslie*, 136 Ariz 463, 666 P2d 1072, later app 147 Ariz 38, 708 P2d 719; *State v Godsoe*, 106 Ariz 461, 478 P2d 85; *Webb v Workers' Compensation Com.*, 292 Ark 349, 730 SW2d 222, concurring op at 292 Ark 352, 733 SW2d 726; *People v Holzer* (2nd Dist) 25 Cal App 3d 456, 102 Cal Rptr 11; *State v Henderson*, 243 La 233, 142 So 2d 407, cert den 371 US 942, 9 L Ed 2d 276, 83 S Ct 324; *State v Ruybal* (Me) 408 A2d 1284; *People v Dardie*, 36 Mich App 709, 193 NW2d 899; *State v Blackwell*, 65 Nev 405, 198 P2d 280, reh den 65 Nev 425, 200 P2d 698 and cert den 336 US 939, 93 L Ed 1097, 69 S Ct 742 (substitution after plea of guilty entered; court rule involved); *Woods v State* (Tex Crim) 569 SW2d 901, cert den 453 US 913, 69 L Ed 2d 995, 101 S Ct 3145, habeas corpus proceeding, en banc (Tex Crim) 745 SW2d 21; *State v Herfel*, 49 Wis 2d 513, 182 NW2d 232.

Annotations: 83 ALR2d 1032 § 3[a].

39. *United States v Niemiec* (CA7 Ind) 611 F2d 1207; *United States v Ortiz* (CA9 Ariz) 603 F2d 76, cert den 444 US 1020, 62 L Ed 2d 652, 100 S Ct 678; *Government of Canal Zone v O'Calagan* (CA5 Canal Zone) 580 F2d 161, cert den 439 US 990, 58 L Ed 2d 664, 99 S Ct 589; *United States v McCallie* (CA6 Tenn) 554 F2d 770; *Rogers v United States* (CA10 Okla) 350 F2d 297; *Carbo v United States* (CA9 Cal) 314 F2d 718, cert den 377 US 953, 12 L Ed 2d 498, 84 S Ct 1625, reh den 377 US 1010, 12 L Ed 2d 1058, 84 S Ct 1902 and cert den 377 US 953, 12 L Ed 2d 498, 84 S Ct 1626, reh den 377 US 1010, 12 L Ed 2d 1058, 84 S Ct 1902 and reh den 377 US 1010, 12 L Ed 2d 1058, 84 S Ct 1903 and cert den 377 US 953, 12 L Ed 2d 498, 84 S Ct 1627 and (disagreed with by multiple cases as stated in *United States v Burke* (CA7 Ill) 781 F2d 1234, 19 Fed Rules Evid Serv 920); *Jacobs v State* (Ala App) 465 So 2d 466; *State v Leslie*, 136 Ariz 463, 666 P2d 1072, later app 147 Ariz 38, 708 P2d 719; *People v Downer*, 57 Cal 2d 800, 22 Cal Rptr 347, 372 P2d 107; *People v Poole* (4th Dist) 168 Cal App 3d 516, 214 Cal Rptr 502 (dis-

may be simple enough that the sentencing judge can learn enough about it at the sentencing proceeding to properly impose sentence.⁴⁰

§ 223. —Under Federal Rules

Rule 25(a) of the Federal Rules of Criminal Procedure permits the continuation under a substitute judge of a criminal trial that is disrupted by the original judge's disability.⁴¹

The Federal Rules of Criminal Procedure provide that if by reason of death, sickness, or other disability a judge is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.⁴²

Rule 25(a) of the Federal Rules of Criminal Procedure was not intended to serve as a means of substitution merely for the convenience of the presiding judge. Thus, substitution was improper where the trial judge was not ill or otherwise disabled, but merely had a prior commitment.⁴³

Rule 25(a) expressly applies to a disability to proceed with the trial brought about by death or sickness. Neither death nor a disabling sickness necessarily affects the integrity of all prior proceedings in the trial. Under such circumstances, if the record is free of any problems caused by the judge's disability which affects the integrity of the trial to date, another judge who has familiarized himself with the record may readily take over and finish the trial. Where the disability directly implicates the character and integrity of the judge, especially in relation to criminal proceedings, the designation of another judge would not remove the appearance of partiality concerning all prior rulings and all actions of the indicted judicial officer, from the inception of the trial. To establish the appearance of justice under such extraordinary circumstances, a new judge would necessarily be compelled to begin the trial anew.⁴⁴

The substitution of a magistrate for the trial judge to preside over closing arguments when the trial judge became ill did not comply with the mandate of

agreed with on other grounds by *People v Prather* (4th Dist) 204 Cal App 3d 1331, 252 Cal Rptr 7, review gr (Cal) 254 Cal Rptr 508, 765 P2d 940 and reprinted for tracking pending review (4th Dist) 217 Cal App 3d 498, superseded 50 Cal 3d 428, 267 Cal Rptr 605, 787 P2d 1012, reh den (Cal) 1990 Cal LEXIS 2043) and (disagreed with on other grounds by *People v Rodrigues* (5th Dist) 205 Cal App 3d 1487, 253 Cal Rptr 306); *People v Duke* (2nd Dist) 276 Cal App 2d 630, 81 Cal Rptr 69; *People v Valverde* (4th Dist) 221 Cal App 2d 616, 34 Cal Rptr 577; *Mobley v State* (Fla App D1) 407 So 2d 1037; *Caplinger v State* (Fla App D3) 271 So 2d 780; *State v Allo* (La) 527 So 2d 976; *State v Henderson*, 243 La 233, 142 So 2d 407, cert den 371 US 942, 9 L Ed 2d 276, 83 S Ct 324; *State v De Stasio*, 49 NJ 247, 229 A2d 636, cert den 389 US 830, 19 L Ed 2d 89, 88 S Ct 96; *Warner v State* (Tex App Houston (1st Dist)) 646 SW2d 478.

However, contrary authority also exists. *Lawley v State* (Fla App D1) 377 So 2d 824.

40. *United States v McGuinness* (CA11 Fla) 769 F2d 695.

Where the case at issue was not complex, and the sentencing judge, prior to sentencing, reviewed the files and records in the case, including the presentence report, and met with the same sentencing counsel that had consulted with the original trial judge regarding the proper disposition of the matter, the case was particularly proper for disposition by a successor judge when the original trial judge became ill. *United States v Niemiec* (CA7 Ind) 611 F2d 1207.

41. *United States v Sisk* (CA6 Tenn) 629 F2d 1174, cert den 449 US 1084, 66 L Ed 2d 809, 101 S Ct 871.

42. Fed Rules of Crim Proc, Rule 25(a).

43. *United States v Lane* (CA9 Cal) 708 F2d 1394, 13 Fed Rules Evid Serv 931, 73 ALR Fed 825.

44. *United States v Jaramillo* (CA9 Nev) 745 F2d 1245, cert den 471 US 1066, 85 L Ed 2d 499, 105 S Ct 2142.

Rule 25(a) of the Federal Rules of Criminal Procedure as the magistrate was neither a judge regularly sitting in or assigned to the court nor familiar with the record of the trial.⁴⁵

Both the Federal Rules of Civil Procedure⁴⁶ and the Federal Rules of Criminal Procedure⁴⁷ provide for the substitution of judges after the verdict is returned.

2. JURY [§§ 224, 225]

§ 224. Generally

In jury trial cases it is the province of the jury to determine questions of fact arising in the case on trial, and their presence at every stage of the trial at which such issues are presented is essential. However, since questions of law are determinable by the trial judge,⁴⁸ it is within the discretion of the trial judge,⁴⁹ and it is not a denial of the constitutional right to a jury trial,⁵⁰ to exclude the jury during discussions of questions of law, as well as during preliminary hearings to determine the competency of evidence.⁵¹ It is improper to challenge a party in the presence of the jury to waive his legal rights.⁵² While it has been held that good practice requires the exclusion of the jury during such preliminary examinations,⁵³ inasmuch as the matter rests in the discretion of the court, it is not error to permit the jury to hear arguments upon questions of law,⁵⁴ such as arguments upon the admissibility of evidence or competency of witnesses,⁵⁵ or to hear the proof preliminary to the introduction of evidence,⁵⁶ particularly in the absence of a request that the jury be sent out.⁵⁷ A judicial determination outside the presence of the jury of the admissi-

45. *United States v Boswell* (CA5 Miss) 565 F2d 1338, reh den (CA5 Miss) 568 F2d 1367 and cert den 439 US 819, 58 L Ed 2d 110, 99 S Ct 81 and later app (CA5 Miss) 605 F2d 171.

46. Fed Rules of Civ Proc, Rule 63.

47. Fed Rules of Crim Proc, Rule 25(b).

48. §§ 714 et seq.

49. *Slaughter v Heath*, 127 Ga 747, 57 SE 69; *People v Becker*, 215 NY 126, 109 NE 127, reh den 215 NY 721, 109 NE 1086; *State v Kelly*, 28 Or 225, 42 P 217.

As to substitution of jurors, see § 1701.

As to the presence of the jury during an application for a view, see § 263.

50. *People v Becker*, 215 NY 126, 109 NE 127, reh den 215 NY 721, 109 NE 1086.

51. *Karp v Cooley* (CA5 Tex) 493 F2d 408, reh den (CA5 Tex) 496 F2d 878 and cert den 419 US 845, 42 L Ed 2d 73, 95 S Ct 79; *L'Etoile v Director of Public Works*, 89 RI 394, 153 A2d 173, 77 ALR2d 1174; *Couch v State*, 93 Tex Crim 27, 245 SW 692, 25 ALR 1359, later app 103 Tex Crim 188, 279 SW 821; *Re Peters' Estate*, 116 Vt 32, 69 A2d 281.

As to province of court to determine competency of evidence, see § 741.

52. *State v Levy* (Iowa) 160 NW2d 460, 32 ALR3d 893; *Johnson v Kinney*, 232 Iowa 1016, 7 NW2d 188, 144 ALR 997.

53. *State v Furney*, 41 Kan 115, 21 P 213.

However, in *State v Kelly*, 28 Or 225, 42 P 217, the court was unimpressed with the argument that if the preliminary hearing were had in the presence of the jury, the jurors would ordinarily learn of the nature of the evidence and be influenced thereby in arriving at their verdict, although the evidence should be excluded, and the court observed that the law assumes and experience has shown that juries are capable of discrimination in this respect.

54. *Slaughter v Heath*, 127 Ga 747, 57 SE 69; *People v Becker*, 215 NY 126, 109 NE 127, reh den 215 NY 721, 109 NE 1086.

55. *Holt v United States*, 218 US 245, 54 L Ed 1021, 31 S Ct 2.

56. *State v Furney*, 41 Kan 115, 21 P 213; *State v Kacar*, 74 Mont 269, 240 P 365; *Couch v State*, 93 Tex Crim 27, 245 SW 692, 25 ALR 1359, later app 103 Tex Crim 188, 279 SW 821.

57. *Lake E. & W.R. Co. v Huffman*, 177 Ind 126, 97 NE 434; *State v Furney*, 41 Kan 115, 21 P 213; *Ellis v State*, 65 Miss 44, 3 So 188.

bility of identification evidence may often be advisable,⁵⁸ and in some circumstances, such a determination may be constitutionally necessary. It does not follow, however, that the Constitution requires a per se rule compelling such procedure in every case.⁵⁹

A jury may not be excluded from the courtroom during the taking of evidence which they should hear.⁶⁰

The principle that error, to be a ground for reversal, must be prejudicial applies to failure to retire the jury while matters of law are under argument.⁶¹

§ 225. During commitment of witnesses

While some courts hold that it is within the discretion of the trial judge to commit a witness for perjury in the presence of the jury,⁶² and the trial court may in its discretion and in the presence of the jury commit a contumacious witness for contempt,⁶³ as a general rule, it is error for the court in the presence of the jury to order a witness to be taken into custody for possible perjury charges,⁶⁴ as is also an unjustified order which is calculated to have the effect of intimidating witnesses.⁶⁵ It has been so held under statutes authorizing a court immediately to commit a witness for perjury upon a trial,⁶⁶ and also in states permitting comment upon the evidence and testimony.⁶⁷ The reason for the rule is that such action is tantamount to the court giving its opinion upon the credibility of the witness.⁶⁸ The error may, however, be waived.⁶⁹ In any event, the commitment of a witness is not prejudicial where it is made without the knowledge of the jury; and does not have the effect of intimidating witnesses.⁷⁰

58. *Watkins v Sowders*, 449 US 341, 66 L Ed 2d 549, 101 S Ct 654; *United States v Mitchell* (CA3 Pa) 540 F2d 1163, cert den 429 US 1099, 51 L Ed 2d 547, 97 S Ct 1119; *United States v Cranson* (CA4 Va) 453 F2d 123, cert den 406 US 909, 31 L Ed 2d 821, 92 S Ct 1607; *Haskins v United States* (CA10 Okla) 433 F2d 836; *United States v Ranciglio* (CA8 Mo) 429 F2d 228, cert den 400 US 959, 27 L Ed 2d 268, 91 S Ct 358; *United States v Allison* (CA9 Cal) 414 F2d 407, cert den 396 US 968, 24 L Ed 2d 433, 90 S Ct 449; *United States v Broadhead* (CA7 Ind) 413 F2d 1351, cert den 396 US 1017, 24 L Ed 2d 508, 90 S Ct 581; *Clemons v United States*, 133 App DC 27, 408 F2d 1230, cert den 394 US 964, 22 L Ed 2d 567, 89 S Ct 1318.

59. *Watkins v Sowders*, 449 US 341, 66 L Ed 2d 549, 101 S Ct 654.

60. *People v Becker*, 215 NY 126, 109 NE 127, reh den 215 NY 721, 109 NE 1086.

61. *National Box Co. v Bradley*, 171 Miss 26, 157 So 91, 95 ALR 1500; *Couch v State*, 93 Tex Crim 27, 245 SW 692, 25 ALR 1359, later app 103 Tex Crim 188, 279 SW 821.

62. *People v Hayes*, 140 NY 484, 35 NE 951.

63. *Loan v State*, 69 Tex Crim 221, 153 SW 305.

Fining or imprisoning a witness for contempt of court does not constitute a ground for reversal in a case in connection with which the misconduct occurs, even though the action of the court in that respect is taken in the presence of the jury. *State v Swink*, 151 NC 726, 66 SE 448.

64. *Johnson v State* (Fla App D2) 343 So 2d 110; *State v Swink*, 151 NC 726, 66 SE 448; *Talliaferro v State*, 20 Okla Crim 57, 200 P 1068; *Hampton v State*, 120 Tex Crim 158, 46 SW2d 314.

As to commitment of witness in presence of jury as ground for new trial, see 58 Am Jur 2d, New Trial § 156.

65. *Coleman v State*, 82 Tex Crim 332, 199 SW 473.

66. *Golden v State*, 75 Miss 130, 21 So 971.

67. *People v Davis*, 247 Mich 602, 226 NW 337, later app 247 Mich 672, 226 NW 671.

68. *Johnson v State* (Fla App D2) 343 So 2d 110.

As to the court's right to comment on the credibility of witnesses, see § 300.

69. *Chase v State*, 75 Miss 502, 22 So 828.

70. *State v Hidalgo*, 167 La 628, 120 So 31; *Smith v State*, 205 Tenn 502, 327 SW2d 308, cert den 361 US 930, 4 L Ed 2d 354, 80 S Ct

3. PARTIES [§§ 226, 227]

§ 226. Generally

While every litigant has a fundamental right to be present at every stage of the trial,⁷¹ this right is not absolute in civil actions.⁷² In light of the policy that the trial court has the power to protect the constitutional guaranties of due process and an impartial jury, the trial court has discretion to exclude plaintiffs from the courtroom during the liability phase of their trials. This discretion is, however, not to be unbridled. The plaintiff may only be excluded from the liability phase of a bifurcated trial. It would be improper to ever exclude the plaintiff from the damages portion of the trial, in that the extent of the injuries suffered is relevant to the determination of the amount of damages awarded.⁷³

A party in a civil action may choose not to be present at the trial of the case and to be represented solely by counsel.⁷⁴ It is not essential to the jurisdiction of the court that the parties be present at all times during the trial.⁷⁵ Parties must be given the opportunity to be present, but if that opportunity is given, their absence during the trial does not affect the right to proceed.⁷⁶

In most jurisdictions, the right of the accused in a criminal prosecution to be present throughout the entire trial is guaranteed by the state constitution or secured by statute, and according to many decisions, trial of a person without his presence at every stage of the proceedings is a violation of the due process of law guaranty; he is entitled to be present at the commencement of the impaneling of the jury and at every stage of the proceeding thereafter, including the time of the reception of the verdict and the passing of sentence upon him.⁷⁷

372, reh den 361 US 973, 4 L Ed 2d 552, 80 S Ct 585; *Pruett v State*, 114 Tex Crim 44, 24 SW2d 41.

71. *Fillippon v Albion Vein Slate Co.*, 250 US 76, 63 L Ed 853, 39 S Ct 435; *Whaley v State*, 263 Ala 191, 82 So 2d 187; *Willingham v Willingham*, 192 Ga 405, 15 SE2d 514; *Maloney v Shoparama Invest. Associates, Ltd.* (3d Dept) 144 App Div 2d 112, 534 NYS2d 451, app dismd 74 NY2d 642, 541 NYS2d 982, 539 NE2d 1110; *Re Donna K.* (4th Dept) 132 App Div 2d 1004, 518 NYS2d 289.

The right of a party to be present at each stage of a law suit is virtually sacrosanct. *Ferrigno v Yoder* (Fla App D2) 495 So 2d 886, 11 FLW 2180, review den (Fla) 504 So 2d 768.

The right to trial by jury in a civil case carries with it the privilege to be present at the selection of the jury. *Harrington v Decker*, 134 Vt 259, 356 A2d 511.

As to the absence of a party as ground for new trial, see 58 Am Jur 2d, New Trial § 102.

72. *Maloney v Shoparama Invest. Associates, Ltd.* (3d Dept) 144 App Div 2d 112, 534 NYS2d 451, app dismd 74 NY2d 642, 541 NYS2d 982, 539 NE2d 1110; *Re Donna K.* (4th Dept) 132 App Div 2d 1004, 518 NYS2d 289.

73. *Gage v Bozarth* (Ind App) 505 NE2d 64.

Where a plaintiff in a personal injury action is adequately represented by counsel, he does not have a constitutional right to be present in court when the liability issue is litigated, where his physical and mental condition is such that he can neither contribute evidence on the question of fault nor comprehend the proceedings. *Dickson v Bober*, 269 Minn 334, 130 NW2d 526.

Practice References: Courtroom presence of injured plaintiff. 14 Am Jur Trials 101, Glass Door Accidents § 50.

74. *Chapman v Avco Financial Services Leasing Co.*, 193 Ga App 147, 387 SE2d 391, 11 UCCRS2d 1224.

75. *Whaley v State*, 263 Ala 191, 82 So 2d 187.

76. *Hiltibrand v Brown*, 124 Colo 52, 234 P2d 618; *Re Unauthorized Practice of Law*, 175 Ohio St 149, 23 Ohio Ops 2d 445, 192 NE2d 54, 2 ALR3d 712, cert den 376 US 970, 12 L Ed 2d 85, 84 S Ct 1136, reh den 377 US 940, 12 L Ed 2d 304, 84 S Ct 1332.

77. 21A Am Jur 2d, Criminal Law §§ 692 et seq., 901 et seq.

As to the absence of accused as ground for

§ 227. Inmates

The right to access to the court does not give an inmate an absolute right to leave prison to appear in court.⁷⁸ Whether a prisoner should be permitted to be brought to trial to argue his case personally depends upon the particular circumstances of each case. The following criteria are to be weighed in making this determination: (1) whether the prisoner's request to be present at trial reflects something more than a desire to be temporarily free from prison; (2) whether he is capable of conducting an intelligent and responsive argument; (3) the cost and convenience of transporting the prisoner from his place of incarceration to the courthouse; (4) any potential danger or security risk the prisoner's presence might pose; (5) the substantiality of the matter at issue; (6) the need for an early resolution of the matter; (7) the possibility and wisdom of delaying the trial until the prisoner is released; (8) the probability of success on the merits; and (9) the prisoner's interest in presenting his testimony in person rather than by deposition.⁷⁹

4. COUNSEL [§§ 228, 229]

§ 228. Generally

Other than in certain narrowly defined circumstances,⁸⁰ the right to effective assistance of counsel does not extend to civil actions or administrative proceedings.⁸¹ It is evident, however, that there is considerable risk for a court and for the parties when one party enters into a stipulation without representation by counsel. This risk is heightened when the unrepresented party is disadvantaged.⁸²

There is no constitutional or statutory requirement that an indigent party be provided with court-appointed counsel in a civil proceeding.⁸³ The appointment of counsel to represent an indigent prisoner in a civil rights case is not

new trial, see 58 Am Jur 2d, New Trial §§ 103, 104.

78. *Drescher v Summers* (Cuyahoga Co) 30 Ohio App 3d 271, 30 Ohio BR 469, 507 NE2d 1170; *Birido v Holbrook* (Tex App Fort Worth) 775 SW2d 411, writ den (Dec 6, 1989) and reh of writ of error overr (Feb 7, 1990).

79. *Mancino v Lakewood* (Cuyahoga County) 36 Ohio App 3d 219, 523 NE2d 332.

80. *Prokopiw v Commissioner of Education* (3d Dept) 149 App Div 2d 874, 540 NYS2d 562, app dismd without op 75 NY2d 809, 552 NYS2d 111, 551 NE2d 604.

In proceedings wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required. *Re T.W.* (Fla) 551 So 2d 1186, 14 FLW 531.

When a hearing judge interviews a child in a custody case, counsel must be present and counsel must have the opportunity to question the child. *Cyran v Cyran*, 389 Pa Super 128, 566 A2d 878.

Practice References: Right to counsel. 14 Am Jur Trials 619, Juvenile Court Proceedings §§ 26-30.

81. *Christiansen v Missouri State Bd. of Accountancy* (Mo App) 764 SW2d 952; *Prokopiw v Commissioner of Education* (3d Dept) 149 App Div 2d 874, 540 NYS2d 562, app dismd without op 75 NY2d 809, 552 NYS2d 111, 551 NE2d 604; *Presley v Hanks* (Tenn App) 782 SW2d 482; *Lyon v Lyon* (Tenn App) 765 SW2d 759.

There is no constitutional right to counsel in a civil action to establish paternity. *State Dept. of Human Services v Tarvers* (Me) 561 A2d 1029.

82. *Blattner v Blattner* (Minn App) 411 NW2d 24.

83. *Brown v Diaz*, 184 Ga App 409, 361 SE2d 490, cert den 485 US 1037, 99 L Ed 2d 914, 108 S Ct 1600; *Fitzpatrick v Hoehn* (Mo App) 746 SW2d 652; *Re Adoption of K.L.J.K.*, 224 Mont 418, 730 P2d 1135; *Archuleta v Goldman* (App) 107 NM 547, 761 P2d 425, cert den 105 NM 689, 736 P2d 494; *Craig v Hey* (W Va) 345 SE2d 814.

necessary unless it is shown that the denial of proper representation will result in fundamental unfairness impinging upon the inmate's due process rights, or that circumstances of the case may make the presence of counsel necessary.⁸⁴

The arbitrary refusal of any court to hear a party by counsel employed by and appearing for him would be a denial of a hearing and in a constitutional sense a denial of due process.⁸⁵

The general rule is that a party has a right to conduct his own case.⁸⁶ Ordering a party to be represented by an attorney abridges that person's right to be heard by himself.⁸⁷

Where a statute specifically provides that where counsel for a party fails to appear to prosecute his claim, when called to trial, the court may dismiss without prejudice or grant a continuance, the court may not invent a new procedure, regardless of provocation, and enter a judgment in a nominal amount in order to punish the plaintiff for failing to proceed as ordered.⁸⁸

The right of a person accused of a crime to the assistance of counsel for his defense is a common-law right, and although it is specifically guaranteed in the constitutions of many states, it does not depend on any express guaranty. The basic guaranty of due process of law includes the right to the aid of counsel, and the failure to give the accused reasonable time and opportunity to secure counsel of his own choice prior to trial is a denial of due process.⁸⁹ Although a natural person may appear in his own behalf and represent himself, even if he is not a lawyer,⁹⁰ an accused who elects to be heard by counsel, is not entitled to act for himself in the conduct of the trial.⁹¹

One who is accused of a crime has a right to counsel of his own selection and as many as he may see fit to employ.⁹²

§ 229. Additional counsel after impaneling of jury

A party to a civil action ordinarily has the right to have additional counsel come into the trial on his behalf even after the impaneling of the jury, unless the circumstances are such that prejudice to the opposing party would probably result or there is a statute or rule of court prohibiting such an

84. *Brown v Diaz*, 184 Ga App 409, 361 SE2d 490, cert den 485 US 1037, 99 L Ed 2d 914, 108 S Ct 1600.

85. *Powell v Alabama*, 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527; *Seattle v Erickson*, 55 Wash 675, 104 P 1128.

86. *United States v Plattner* (CA2 NY) 330 F2d 271.

87. *Ex parte Shaffer* (Tex) 649 SW2d 300.

88. *Barr v Gunderson* (App, Lake Co) 28 Ohio Ops 2d 347, 92 Ohio L Abs 462, 195 NE2d 604.

89. 21A Am Jur 2d, Criminal Law §§ 732 et seq., 967 et seq.

As to the presence of counsel during the giving of instructions after the retirement of the jury, see §§ 1114-1116 et seq.

As to the presence of counsel at the reception of the verdict, see § 1777.

As to the presence of counsel on arraignment, see 21A Am Jur 2d, Criminal Law §§ 747, 973.

As to new trial because of the absence of counsel from the courtroom, see 58 Am Jur 2d, New Trial § 107.

90. 21A Am Jur 2d, Criminal Law §§ 764 et seq., 993 et seq.

91. 21A Am Jur 2d, Criminal Law §§ 767, 996, 997.

92. *State v Waterhouse*, 3 Conn Cir 102, 208 A2d 354; *Jackson v State*, 55 Tex Crim 79, 115 SW 262.

As to an accused's right to be heard by counsel, see § 491.

As to assignment of counsel by the court, see 7 Am Jur 2d, Attorneys at Law § 243.

As to an accused's constitutional right to counsel, see 16A Am Jur 2d, Constitutional Law § 842.

addition of counsel.⁹³ Where the objection interposed or made the basis of a motion for a mistrial is that counsel has had no opportunity to examine the jurors as to their possible relationship or partiality to such additional counsel and has consequently been prevented from fully exercising his right of challenging jurors for cause or peremptorily, trial courts have endeavored to ascertain whether there is in fact any disqualifying relationship or partiality between the additional counsel and any of the impaneled jury, or any improper motive underlying the delayed appearance of the additional counsel, and have then ruled upon the matter in the light of that inquiry.⁹⁴

A trial court's refusal to permit additional counsel to come into a trial after the jury has been impaneled may, under some circumstances, be violative of the rights of the party for whom he sought to appear and participate in the trial, particularly where no statute or rule of court stands in the way and the addition of such counsel would not be prejudicial to the opposing party.⁹⁵ On the other hand, there are several instances in which the trial court's exclusion of additional counsel who sought to come into the case after the jury was impaneled, or its restriction of such counsel's participation, has been considered, under the circumstances, a proper exercise of the court's discretion.⁹⁶

5. INTERPRETERS [§§ 230-235]

§ 230. Generally

The appointment of interpreters for witnesses who do not understand or speak the English language is usually provided for by statute⁹⁷ or rules of court,⁹⁸ but the discretion to determine whether an interpreter is needed is vested in the trial court.⁹⁹

Where the language spoken by a party or witness is not English but a foreign language, a court has the power and authority to appoint an interpreter.¹ This is so because inherent in nature of justice is the notion that those involved in litigation should understand and be understood.²

93. *Re Winslow's Will*, 146 Iowa 67, 124 NW 895.

Annotations: Appearance of additional counsel in civil case after impaneling of jury, 56 ALR2d 971 § 2.

94. *Re Winslow's Will*, 146 Iowa 67, 124 NW 895; *Perry v Faulkner*, 100 NH 125, 120 A2d 804, 56 ALR2d 967.

Annotations: 56 ALR2d 971 § 3.

95. *Kerling v G.W. Van Dusen & Co.*, 109 Minn 481, 124 NW 235, reh den 109 Minn 486, 124 NW 372.

Annotations: 56 ALR2d 971 § 4[a].

96. *First Nat. Bank v Miller*, 235 Ill 135, 85 NE 312; *Fennell v Frisch's Adm'r*, 192 Ky 535, 234 SW 198.

Annotations: 56 ALR2d 971 § 4[c].

97. *Respublica v Mesca (Pa)* 1 US 73, 1 L Ed 42; *State v Vasquez*, 101 Utah 444, 121 P2d

903, 140 ALR 755 (per opinion of Moffat, Ch.J.).

An interpreter is a witness subject to all provisions relating to witnesses. Rule 102(2), Model Code of Evidence.

As to the compensation of interpreters, see 20 Am Jur 2d, Costs § 65.5.

Law Reviews: Grabau and Williamson, *Language Barriers in Our Trial Courts*. 70 Mass LR 108 (September, 1985).

98. As to the use of interpreters in federal court, see 32B Am Jur 2d, Federal Rules of Evidence §§ 338 et seq.

99. § 231.

1. *Nioum v Commonwealth*, 128 Ky 685, 108 SW 945; *Santana v New York City Transit Authority*, 132 Misc 2d 777, 505 NYS2d 775; *Wise v Short*, 181 NC 320, 107 SE 134.

Practice References: Use of interpreter where witness has language problems. 5 Am Jur Trials 611, Presenting Plaintiff's Case § 19.

An interpreter should never be appointed unless necessary to the conduct of a case.³ That is, interpretation should be resorted to only when a witness' natural mode of expression is not intelligible to the tribunal.⁴ This is so because no matter how disinterested an interpreter might be, there always exists a possibility that he will inadvertently distort the message communicated by the primary witness.⁵

Practice guide: It has been pointed out that the courts should make every effort to open their doors to all who seek to come through them. If the power to appoint an interpreter in cases of an unusual disability does not exist directly by statute, then it does by statutory interpretation. The authority to appoint interpreters pursuant to statute extends beyond language interpreters and applies to interpreters for witnesses or parties with physical and mental disabilities.⁶

In case of deaf-mutes, it is within the discretion of the trial court whether their testimony shall be taken through an interpreter by means of signs or by means of written questions and answers.⁷ An interpreter may be used for a witness who cannot speak audibly or articulately, although the person communicating with the witness may be little more than an intermediary.⁸

Observation: The overwhelming majority of cases in which interpreters have been employed have involved situations in which either (a) the primary witness was physically incapable of speaking, or (b) the primary witness could speak only a foreign language. Nonetheless, other situations may arise in which resort to interpretation is necessary.⁹

§ 231. Court's discretion

The decision whether an interpreter is required is a matter primarily entrusted to the sound discretion of the trial court.¹⁰ The trial court's decision

2. *Santana v New York City Transit Authority*, 132 Misc 2d 777, 505 NYS2d 775.

3. *Prokop v State*, 148 Neb 582, 28 NW2d 200, 172 ALR 916; *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140.

4. *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140.

5. *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140.

6. *People v Miller*, 140 Misc 2d 247, 530 NYS2d 490.

7. *Dobbins v Little R.R. & E. Co.*, 79 Ark 85, 95 SW 794; *Bugg v Houlika*, 122 Miss 400, 84 So 387, 9 ALR 480; *State v Weldon*, 39 SC 318, 17 SE 688.

Law Reviews: Gardner, *Deaf Victims and Defendants in the Criminal Justice System*, 19 Clear R 748 (November, 1985).

8. *Almon v State*, 21 Ala App 466, 109 So 371; *Renick v Hays*, 201 Ky 192, 256 SW 26.

9. *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140.

10. *Perovich v United States*, 205 US 86, 51 L

Ed 722, 27 S Ct 456; *Valladares v United States* (CA11 Ga) 871 F2d 1564; *United States v Lim* (CA9 Cal) 794 F2d 469, cert den 479 US 937, 93 L Ed 2d 367, 107 S Ct 416; *United States v Coronel-Quintana* (CA8 ND) 752 F2d 1284, cert den 474 US 819, 88 L Ed 2d 54, 106 S Ct 66; *United States v Martinez* (CA5 Tex) 616 F2d 185, 6 Fed Rules Evid Serv 123, cert den 450 US 994, 68 L Ed 2d 193, 101 S Ct 1694 and cert den 450 US 994, 68 L Ed 2d 193, 101 S Ct 1695; *United States v Salsedo* (CA9 Cal) 607 F2d 318, 5 Fed Rules Evid Serv 180; *United States v Carrion* (CA1 Mass) 488 F2d 12, cert den 416 US 907, 40 L Ed 2d 112, 94 S Ct 1613; *Giraldo-Rincon v Dugger* (MD Fla) 707 F Supp 504; *Hilbert v Kundicoff*, 204 Cal 485, 268 P 905; *Gardiana v Small Claims Court for San Leandro-Hayward Judicial Dist.* (1st Dist) 59 Cal App 3d 412, 130 Cal Rptr 675; *La Count v State*, 237 Ga 181, 227 SE2d 31, cert den 429 US 1046, 50 L Ed 2d 761, 97 S Ct 753; *Gonzales v State*, 182 Ga App 594, 356 SE2d 545; *State v Faafiti*, 54 Hawaii 637, 513 P2d 697; *People v Lopez* (1st Dist) 114 Ill App 3d 1018, 70 Ill Dec 580, 449 NE2d 927; *People v Castro* (1st Dist) 109 Ill App 3d 561, 65 Ill Dec 153, 440 NE2d 1008; *People v*

in this regard will not be disturbed on appeal unless an abuse of discretion is manifest.¹¹ The court's exercise of its discretion as to whether an interpreter was, in fact, necessary will not be held to have been abused where the record shows that the accused was sufficiently conversant with English to understand and be understood in the criminal proceedings against him.¹² Where there is uncontradicted evidence that the witness does not speak or understand English, it would be an abuse of discretion to fail to appoint an interpreter.¹³

§ 232. Rights of criminal defendants

Each defendant unable to understand English is constitutionally entitled to his own separate interpreter.¹⁴ It is axiomatic that an indigent defendant who is unable to speak and understand the English language should be afforded

Rivera (1st Dist) 72 Ill App 3d 1027, 28 Ill Dec 669, 390 NE2d 1259; *People v Starling* (1st Dist) 21 Ill App 3d 217, 315 NE2d 163; *People v Castillon* (1st Dist) 132 Ill App 2d 581, 270 NE2d 268; *State v Van Pham*, 234 Kan 649, 675 P2d 848; *Commonwealth v Turell*, 6 Mass App 937, 381 NE2d 1123; *People v Atsilis*, 60 Mich App 738, 231 NW2d 534; *State v Saldana*, 310 Minn 249, 246 NW2d 37; *State v Perez* (Minn App) 404 NW2d 834; *Prokop v State*, 148 Neb 582, 28 NW2d 200, 172 ALR 916; *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140; *People v Navarro* (2d Dept) 134 App Div 2d 460, 521 NYS2d 82; *State v Coria*, 39 Or App 507, 592 P2d 1057; *State v Korich*, 130 Wash 243, 226 P 1016, error dismd 271 US 690, 70 L Ed 1153, 46 S Ct 472; *State v Trevino*, 10 Wash App 89, 516 P2d 779, review den 83 Wash 2d 1009.

The trial court is in the best position to determine whether a defendant possesses the requisite degree of fluency in the English language so that his right to confront witnesses, right to cross-examine those witnesses, and right to competent counsel will not be abridged. *State v Natividad*, 111 Ariz 191, 526 P2d 730.

Annotations: Right of accused to have evidence or court proceedings interpreted, 36 ALR3d 276 § 7.

11. *United States v Salsedo* (CA9 Cal) 607 F2d 318, 5 Fed Rules Evid Serv 180; *State v Natividad*, 111 Ariz 191, 526 P2d 730; *People v Lacang*, 213 Cal 65, 1 P2d 7; *Gardiana v Small Claims Court for San Leandro-Hayward Judicial Dist.* (1st Dist) 59 Cal App 3d 412, 130 Cal Rptr 675; *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140.

12. *Perovich v United States*, 205 US 86, 51 L Ed 722, 27 S Ct 456; *United States v Lim* (CA9 Cal) 794 F2d 469, cert den 479 US 937, 93 L Ed 2d 367, 107 S Ct 416; *United States v De Leon* (CA7 Ill) 498 F2d 1327; *United States v Smith* (CA10 Colo) 464 F2d 194, cert den 409 US 1066, 34 L Ed 2d 519, 93 S Ct 566; *United States v Sosa* (CA7 Ill) 379 F2d 525, cert den 389 US 845, 19 L Ed 2d 111, 88 S Ct 94;

Reyes v Slayton (WD Va) 341 F Supp 926; *State v Kabinto*, 106 Ariz 575, 480 P2d 1; *Larias v State* (Fla App D3) 528 So 2d 944, 13 FLW 1643; *Gonzales v State*, 182 Ga App 594, 356 SE2d 545; *People v Lopez* (1st Dist) 114 Ill App 3d 1018, 70 Ill Dec 580, 449 NE2d 927; *People v Castro* (1st Dist) 109 Ill App 3d 561, 65 Ill Dec 153, 440 NE2d 1008; *State v Saldana*, 310 Minn 249, 246 NW2d 37; *State v Perez* (Minn App) 404 NW2d 834; *Johnson v State* (Miss) 512 So 2d 1246, cert den 484 US 968, 98 L Ed 2d 402, 108 S Ct 462; *State v Topete*, 221 Neb 771, 380 NW2d 635; *People v Boehm*, 309 NY 362, 130 NE2d 897; *People v Tesfay* (4th Dept) 117 App Div 2d 1001, 499 NYS2d 545; *Cantu v State* (Tex App Corpus Christi) 716 SW2d 688; *Vargas v State* (Tex App San Antonio) 627 SW2d 785; *Flores v State* (Tex Crim) 509 SW2d 580; *Diaz v State* (Tex Crim) 491 SW2d 166; *State v Trevino*, 10 Wash App 89, 516 P2d 779, review den 83 Wash 2d 1009.

Annotations: 36 ALR3d 276 § 9[a].

13. *Gardiana v Small Claims Court for San Leandro-Hayward Judicial Dist.* (1st Dist) 59 Cal App 3d 412, 130 Cal Rptr 675.

14. *United States ex rel. Negron v New York* (CA2 NY) 434 F2d 386; *Giraldo-Rincon v Dugger* (MD Fla) 707 F Supp 504; *United States v Boria* (DC Puerto Rico) 371 F Supp 1068; *United States ex rel. Navarro v Johnson* (ED Pa) 365 F Supp 676; *State v Hansen* (App) 146 Ariz 226, 705 P2d 466, later app 156 Ariz 291, 751 P2d 951, 2 Ariz Adv Rep 17; *State v Rios*, 112 Ariz 143, 539 P2d 900; *People v Aguilar*, 35 Cal 3d 785, 200 Cal Rptr 908, 677 P2d 1198; *People v Martinez* (4th Dist) 171 Cal App 3d 727, 217 Cal Rptr 546 (disagreed with on other grounds by *People v Santos* (6th Dist) 222 Cal App 3d 723, 271 Cal Rptr 811); *People v Resendes* (5th Dist) 164 Cal App 3d 812, 210 Cal Rptr 609; *People v Torres* (5th Dist) 164 Cal App 3d 266, 210 Cal Rptr 375; *In re Dung T.* (3rd Dist) 160 Cal App 3d 697, 206 Cal Rptr 772; *People v Romero* (4th Dist) 153 Cal App 3d 757, 200 Cal Rptr 404; *State v Faafiti*, 54 Hawaii 637, 513 P2d 697; *Ex parte*

the right to have the trial proceedings translated into his native language in order to participate effectively in his own defense, provided he makes a timely request for such assistance.¹⁵

■■■■ Observation: A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his attorneys' effectiveness, especially on cross-examination. It would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against an insensible object, possibly infringing upon the accused's basic right to be present in the courtroom at every stage of his trial.¹⁶

A criminal defendant who is unable to understand English has the right to an interpreter throughout the proceedings, and the "borrowing" of a defendant's interpreter to translate for witnesses is a denial of that right. This is so even when the defendant's interpreter is borrowed for a defense witness, as opposed to a prosecution witness.¹⁷

■■■■ Caution: The state is under no duty to personally inform the defendant of his right to simultaneous translation by his interpreter.¹⁸

Although there is generally no reversible error in a trial court's failure to appoint an interpreter for an accused where he does not make a timely request for one,¹⁹ mere failure to make a request for an interpreter does not constitute a waiver. A defendant who passively observes in a state of complete incomprehension the complex wheels of justice grind on before him can hardly be said to have satisfied the classic definition of a waiver as the voluntary and intentional relinquishment of a known right.²⁰

§ 233. Selection of interpreter

The selection of a suitable person as an interpreter is largely a matter within

Nanes (Tex Crim) 558 SW2d 893; State v Vasquez, 101 Utah 444, 121 P2d 903, 140 ALR 755; State v Neave, 117 Wis 2d 359, 344 NW2d 181.

Annotations: Right of accused to have evidence or court proceedings interpreted, 36 ALR3d 276 §§ 4, 5[a].

15. State v Natividad, 111 Ariz 191, 526 P2d 730.

16. State v Natividad, 111 Ariz 191, 526 P2d 730.

17. People v Cervantes (4th Dist) 184 Cal App 3d 1285, 212 Cal Rptr 6, transf, later op, withdrawn.

18. Suarez v State (Fla) 481 So 2d 1201, 11 FLW 1, cert den 476 US 1178, 90 L Ed 2d 994, 106 S Ct 2908, habeas corpus proceeding (Fla) 527 So 2d 190, 13 FLW 386.

19. Rubio v Estelle (CA5 Tex) 689 F2d 533 (disagreed with on other grounds by Wilson v Mintzes (CA6 Mich) 761 F2d 275); United States ex rel. Negron v New York (ED NY) 310

F Supp 1304, affd (CA2 NY) 434 F2d 386; State v Natividad, 111 Ariz 191, 526 P2d 730; People v Carreon (5th Dist) 151 Cal App 3d 559, 198 Cal Rptr 843 (disagreed with by In re Dung T. (3rd Dist) 160 Cal App 3d 697, 206 Cal Rptr 772 (disagreed with by People v Cervantes (4th Dist) 165 Cal App 3d 1193, review gr, reprinted for tracking pending review (4th Dist) 184 Cal App 3d 1285, 212 Cal Rptr 6, transf, later op, withdrawn)); Gonzales v State (Del Sup) 372 A2d 191; Monte v State (Fla App D2) 443 So 2d 339; Gonzales v State, 182 Ga App 594, 356 SE2d 545; People v Soldat, 32 Ill 2d 478, 207 NE2d 449; People v Atsilis, 60 Mich App 738, 231 NW2d 534; People v Ramos, 26 NY2d 272, 309 NYS2d 906, 258 NE2d 197; Mares v State (Tex App San Antonio) 636 SW2d 627, petition for discretionary review ref (Nov 24, 1982); Diaz v State (Tex Crim) 491 SW2d 166; Salas v State (Tex Crim) 385 SW2d 859.

Annotations: 36 ALR3d 276 § 6.

20. State v Natividad, 111 Ariz 191, 526 P2d 730.

the discretion of the trial court.²¹ The better practice is to appoint a disinterested person as interpreter of the testimony of a witness who cannot otherwise be understood.²² This is so because the danger that a primary witness' message will be distorted through interpretation is compounded when the interpreter is biased one way or the other.²³ It has been recognized, however, that situations may arise in which it is necessary to appoint an "interested" interpreter.²⁴ The courts have agreed that such an interested person should not be utilized unless and until the trial judge is satisfied that no disinterested person is available who can adequately translate the primary witness' testimony.²⁵ Even if this requirement is satisfied, the trial judge must still interrogate the "interested" interpreter in order to gauge the extent of his bias, and to admonish him that he must translate exactly what the primary witness has said.²⁶

■■■■ *Practice guide:* One related to a party is not necessarily disqualified from interpreting at a trial.²⁷

§ 234. Role of interpreter

In theory, an interpreter should be totally impersonal. That is, his role is merely that of a conduit from the primary witness to the trier of fact. As such, he should not aid or prompt the primary witness in any way, nor should he merely render a "summary" of what the primary witness has stated. Instead, as far as is possible, he should translate word for word exactly what the primary witness has said.²⁸ When an interpreter is employed, he or she must fully, completely, and accurately translate questions and answers.²⁹

21. *Hilbert v Kundicoff*, 204 Cal 485, 268 P 905; *Gil v State* (Fla App D3) 266 So 2d 43, cert den (Fla) 271 So 2d 139; *State v Korich*, 130 Wash 243, 226 P 1016, error dismd 271 US 690, 70 L Ed 1153, 46 S Ct 472.

22. *Prince v Beto* (CA5 Tex) 426 F2d 875; *Lujan v United States* (CA10 NM) 209 F2d 190; *Barber Asphalt Paving Co. v Odasz* (CA2 NY) 85 F 754; *Almon v State*, 21 Ala App 466, 109 So 371; *Gonzales v State* (Del Sup) 372 A2d 191; *Western & A.R. Co. v Deitch*, 136 Ga 46, 70 SE 798; *People v Allen* (1st Dist) 22 Ill App 3d 800, 317 NE2d 633; *Bielich v State*, 189 Ind 127, 126 NE 220; *Mislik v State*, 184 Ind 72, 110 NE 551; *Paucher v Enterprise Coal Mining Co.*, 183 Iowa 1076, 168 NW 86; *State v Lazarone*, 130 La 1, 57 So 532; *State v Firmatura*, 121 La 676, 46 So 691; *Morse v Phillips*, 157 Miss 452, 128 So 336; *Kley v Abell* (Mo App) 483 SW2d 625; *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140; *Nader v State*, 86 Tex Crim 424, 219 SW 474; *Collette v Edgerton*, 107 Vt 6, 175 A 227; *State v Thompson*, 14 Wash 285, 44 P 533; *Casciato v Rennick* (Wyo) 380 P2d 122.

23. *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140.

24. *Fairbanks v Cowan* (CA6 Ky) 551 F2d 97; *State v Burns* (Iowa) 78 NW 681; *Kotas v*

Commonwealth (Ky) 565 SW2d 445; *Kley v Abell* (Mo App) 483 SW2d 625; *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140; *Menella v Metropolitan S.R. Co.*, 43 Misc 5, 86 NYS 930; *Claycomb v State*, 22 Okla Crim 315, 211 P 429; *Peoples Nat. Bank v Manos Bros., Inc.*, 226 SC 257, 84 SE2d 857, 45 ALR2d 1070.

25. *Prince v Beto* (CA5 Tex) 426 F2d 875; *Lujan v United States* (CA10 NM) 209 F2d 190; *People v Ramirez*, 56 Cal 533; *La Count v State*, 237 Ga 181, 227 SE2d 31, cert den 429 US 1046, 50 L Ed 2d 761, 97 S Ct 753; *Western & A.R. Co. v Deitch*, 136 Ga 46, 70 SE 798; *People v Murphy*, 276 Ill 304, 114 NE 609; *Chicago & A.R. Co. v Shenk*, 131 Ill 283, 23 NE 436; *Morse v Phillips*, 157 Miss 452, 128 So 336; *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140; *Brown v State* (Tex Crim) 59 SW 1118; *State v Thompson*, 14 Wash 285, 44 P 533.

26. *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140.

Annotations: Disqualification, for bias, of one offered as interpreter of testimony, 6 ALR4th 158.

27. *Doucette v State* (Me) 463 A2d 741.

28. *State in interest of R.*, 79 NJ 97, 398 A2d 76, 6 ALR4th 140.

■■■■ **Observation:** Requiring a defendant to relay confidential communications to counsel through an interpreter for his codefendant with conflicting interests introduces a possible chill to the communication process. Unlike a court reporter, a defense interpreter is privy to confidential attorney-client communications. In a very real sense, if only because of linguistic necessity for the duration of trial, the interpreter is part of the defense team.³⁰

§ 235. Replacement of interpreter

During a trial, both the opposing counsel and the judge should be informed of any difficulties which develop with a court-appointed interpreter. It is the duty of the trial judge, not the prosecutor, to appoint and replace interpreters.³¹

6. COURT REPORTERS [§§ 236–239]

§ 236. Generally

Statutes generally provide that the proceedings and evidence on a trial shall be reported by a stenographer,³² and unless it appears that a defendant has expressly waived the presence of a reporter, one must be furnished in all criminal cases³³ as a defendant is entitled to a court reporter.³⁴

In the absence of fault on the part of the litigant who insists on having the trial reported, a statute which provides that, upon the request of either party, the trial judge shall direct the reporter to take full stenographic notes of the proceedings, is mandatory.³⁵ The duty is not on the defendant to request a court reporter.³⁶

A judge does not have the right to excuse a court reporter over the objections of a party.³⁷

§ 237. Federal Court Reporters Act

The Federal Court Reporters Act provides, inter alia, that a Federal District Court reporter must record verbatim all proceedings in criminal cases had in

29. *People v Starling* (1st Dist) 21 Ill App 3d 217, 315 NE2d 163.

30. *People v Resendes* (5th Dist) 164 Cal App 3d 812, 210 Cal Rptr 609.

31. *United States v Anguloa* (CA9 Ariz) 598 F2d 1182 (holding that the prosecutor's ex parte actions in substituting interpreters was improper).

32. *Phillips v Preston*, 46 US 278, 12 L Ed 152; *State v Perkins*, 143 Iowa 55, 120 NW 62; *Commonwealth v Shea*, 356 Mass 358, 252 NE2d 336.

Jury instructions should always be settled in the presence of a court reporter. *Gosewisch v American Honda Motor Co.*, 153 Ariz 400, 737 P2d 376, CCH Prod Liab Rep ¶11531, 83 ALR4th 53.

Practice References: Court reporter. 14 Am

Jur Trials 619, *Juvenile Court Proceedings* § 55.

Forms: Petition or application for appointment of court reporter. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 63.

Motion for order directing preparation by court reporter of daily transcript of proceedings. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 64.

33. *Herren v People*, 147 Colo 442, 363 P2d 1044.

34. *Ex parte White* (Ala) 403 So 2d 292.

35. *National Dairy Products Corp. v Rittle* (Ky) 487 SW2d 894.

36. *Ex parte White* (Ala) 403 So 2d 292.

37. *Re Appeal in Maricopa County Juvenile Action*, 156 Ariz 439, 752 P2d 1025, 5 Ariz Adv Rep 6.

open court; all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceedings.³⁸

■■■■ Observation: The practice of recording closing arguments solely by electronic means without shorthand or mechanical recording is contrary to the requirement of 28 USCS § 753(b) that the court reporter “shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording all proceedings in criminal cases had in open court.” Fearful that problems with electronic tape recording could prejudice the rights of defendants, Congress specifically intended that such sound recording not be the exclusive method of recording criminal proceedings.³⁹

The requirements of the Court Reporters Act (28 USCS § 753) are mandatory⁴⁰ and are not to be overridden by local practice.⁴¹ It is the duty of the court, not the attorney, to see that its provisions are complied with.⁴²

The mandatory provisions of 28 USCS § 753(b) may be waived.⁴³

It has been held that waiver may be by counsel, without the personal consent of the defendant.⁴⁴ However, there is some authority supporting the

38. 28 USCS § 753(b).

39. *United States v Thompson* (CA4 NC) 598 F2d 879.

40. *United States v Gallo* (CA6 Ohio) 763 F2d 1504, cert den 474 US 1068, 88 L Ed 2d 798, 106 S Ct 826 and cert den 474 US 1069, 88 L Ed 2d 800, 106 S Ct 828 and cert den 475 US 1017, 89 L Ed 2d 314, 106 S Ct 1200 and (disapproved on other grounds by Ray v United States, 481 US 736, 95 L Ed 2d 693, 107 S Ct 2093) as stated in *United States v Holzer* (CA7 Ill) 848 F2d 822, cert den 488 US 928, 102 L Ed 2d 333, 109 S Ct 315; *United States v Taylor* (CA5 Tex) 607 F2d 153, reh den (CA5 Tex) 614 F2d 294 and later app (CA5 Tex) 631 F2d 419; *United States v Smith* (CA5 Ala) 591 F2d 1105; *United States v Garner* (CA5 Ala) 581 F2d 481; *United States v Brumley* (CA5 Ga) 560 F2d 1268.

41. *United States v Taylor* (CA5 Tex) 607 F2d 153, reh den (CA5 Tex) 614 F2d 294 and later app (CA5 Tex) 631 F2d 419; *United States v Smith* (CA5 Ala) 591 F2d 1105; *United States v Brumley* (CA5 Ga) 560 F2d 1268.

Irrespective of local practice or rule, the opening and closing arguments of counsel are manifestly a part of the proceedings which must be recorded in a criminal case. *United States v Piascik* (CA9 Wash) 559 F2d 545, cert den 434 US 1062, 55 L Ed 2d 762, 98 S Ct 1235 and (disagreed with on other grounds by *United States v Nolan* (CA7 Wis) 910 F2d 1553, 31 Fed Rules Evid Serv 36, reh den, en banc (CA7) 1990 US App LEXIS 20347 and cert den (US) 113 L Ed 2d 457).

42. *United States v Garner* (CA5 Ala) 581 F2d 481.

43. *United States v Weiner* (CA9 Cal) 578 F2d 757, CCH Fed Secur L Rep ¶96541, cert den 439 US 981, 58 L Ed 2d 651, 99 S Ct 568, reh den 439 US 1135, 59 L Ed 2d 98, 99 S Ct 1060 and (disapproved on other grounds by *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1) as stated in *United States v Massa* (CA8 Mo) 740 F2d 629, 16 Fed Rules Evid Serv 339, cert den 471 US 1115, 86 L Ed 2d 258, 105 S Ct 2357; *United States v Piascik* (CA9 Wash) 559 F2d 545, cert den 434 US 1062, 55 L Ed 2d 762, 98 S Ct 1235 and (disagreed with on other grounds by *United States v Nolan* (CA7 Wis) 910 F2d 1553, 31 Fed Rules Evid Serv 36, reh den, en banc (CA7) 1990 US App LEXIS 20347 and cert den (US) 113 L Ed 2d 457); *United States v Sigal* (CA3 Pa) 341 F2d 837, 65-1 USTC ¶15618, 15 AFTR 2d 498, cert den 382 US 811, 15 L Ed 2d 60, 86 S Ct 23.

Annotations: Prejudicial effect of Federal District Court reporter's omissions in recording judicial proceedings, where such omissions constitute failure to comply with Court Reporter Act, 28 USCS § 753(b), 12 ALR Fed 584 § 7.

44. *United States v Weiner* (CA9 Cal) 578 F2d 757, CCH Fed Secur L Rep ¶96541, cert den 439 US 981, 58 L Ed 2d 651, 99 S Ct 568, reh den 439 US 1135, 59 L Ed 2d 98, 99 S Ct 1060 and (disapproved on other grounds by

view that the requirement that the reporter shall record verbatim "all proceedings in criminal cases had in open court" is not subject to waiver.⁴⁵

§ 238. —Effect of failure to comply

The trial court's failure to comply with 28 USCS § 753(b) does not constitute error per se and will not justify a reversal without a specific showing of prejudice.⁴⁶ In some instances, however, the failure of a court to follow the rule's mandate will require reversal.⁴⁷ Under some authorities, the failure to record closing arguments compels a reversal and new trial. The appropriate procedure, however, is to vacate the judgment and remand for a hearing to determine whether the defendant was prejudiced by the error in failing to record the arguments.⁴⁸

A court reporter's omissions in recording cannot be regarded as prejudicial error where the omissions have been cured by means of a supplemental record setting forth verbatim the matters which were omitted.⁴⁹

Ohio v Roberts, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1) as stated in United States v Massa (CA8 Mo) 740 F2d 629, 16 Fed Rules Evid Serv 339, cert den 471 US 1115, 86 L Ed 2d 258, 105 S Ct 2357.

45. Stansbury v United States (CA5 Tex) 219 F2d 165, 46 AFTR 1673.

46. United States v Gillis (CA4 Md) 773 F2d 549; United States v Gallo (CA6 Ohio) 763 F2d 1504, cert den 474 US 1068, 88 L Ed 2d 798, 106 S Ct 826 and cert den 474 US 1069, 88 L Ed 2d 800, 106 S Ct 828 and cert den 475 US 1017, 89 L Ed 2d 314, 106 S Ct 1200 and (disapproved on other grounds by Ray v United States, 481 US 736, 95 L Ed 2d 693, 107 S Ct 2093) as stated in United States v Holzer (CA7 Ill) 848 F2d 822, cert den 488 US 928, 102 L Ed 2d 333, 109 S Ct 315; United States v Smith (CA5 Ala) 591 F2d 1105; Sabatier v Dabrowski (CA1 RI) 586 F2d 866; Commercial Credit Equipment Corp. v L & A Contracting Co. (CA5 Miss) 549 F2d 979, reh den (CA5 Miss) 553 F2d 100; United States v Long (CA5 Ala) 419 F2d 91, 12 ALR Fed 578.

There was no merit in defendant's contention that reversal of his conviction was required because the court reporter did not transcribe conversations contained on tape recordings played for the jury in violation of the Court Reporters Act (28 USCS § 753(b)), where the tape recordings played to the jury and the transcript of those recordings were part of the record on appeal, as the reviewing court thus had the most accurate record of what was heard by the jury, and the fact that the court reporter did not transcribe the contents of the tape recordings in no way impeded review of the proceedings below. Because the tape recordings played to the jury were part of the record on appeal, there was substantial compliance with 28 USCS § 753(b). United States v

Craig (CA7 Ill) 573 F2d 455, cert den 439 US 820, 58 L Ed 2d 110, 99 S Ct 82, 99 S Ct 83, later proceeding (ND Ill) 703 F Supp 730 (disagreed with by United States v Gottlieb (ND Ill) 738 F Supp 1174) and dismd, in part, affd in part and revd in part (CA7 Ill) 907 F2d 653, 17 FR Serv 3d 431, amd, reh den, en banc (CA7 Ill) 919 F2d 57.

Annotations: Prejudicial effect of Federal District Court reporter's omissions in recording judicial proceedings, where such omissions constitute failure to comply with Court Reporter Act, 28 USCS § 753(b), 12 ALR Fed 584 § 4.

47. United States v Gallo (CA6 Ohio) 763 F2d 1504, cert den 474 US 1068, 88 L Ed 2d 798, 106 S Ct 826 and cert den 474 US 1069, 88 L Ed 2d 800, 106 S Ct 828 and cert den 475 US 1017, 89 L Ed 2d 314, 106 S Ct 1200 and (disapproved on other grounds by Ray v United States, 481 US 736, 95 L Ed 2d 693, 107 S Ct 2093) as stated in United States v Holzer (CA7 Ill) 848 F2d 822, cert den 488 US 928, 102 L Ed 2d 333, 109 S Ct 315.

48. United States v Piascik (CA9 Wash) 559 F2d 545, cert den 434 US 1062, 55 L Ed 2d 762, 98 S Ct 1235 and (disagreed with on other grounds by United States v Nolan (CA7 Wis) 910 F2d 1553, 31 Fed Rules Evid Serv 36, reh den, en banc (CA7) 1990 US App LEXIS 20347 and cert den (US) 113 L Ed 2d 457); Brown v United States (CA9 Wash) 314 F2d 293.

49. Hale v United States (CA5 Ala) 435 F2d 737, cert den 402 US 976, 29 L Ed 2d 142, 91 S Ct 1680.

However, there is some authority supporting the view that a reporter's omissions in recording may constitute plain error. Brown v United States (CA9 Wash) 314 F2d 293.

As to the effect of the death or disability of the court reporter before transcription or com-

§ 239. —Review

A party who seeks to obtain relief on the basis of a court reporter's omissions in recording in violation of the Court Reporters Act must specify the particular way in which he has allegedly been prejudiced as a result of the omissions.⁵⁰ The usual way of doing this is to refer to specific errors, other than the omissions themselves, which occurred at the trial but which were not recorded by the reporter.⁵¹

Even if a party has failed to specify any error which was not recorded or any particular way in which he was allegedly prejudiced as a result of a reporter's omissions in recording, the omissions in recording may have made it impossible to reconstruct, or even to provide any recollection of, certain errors which occurred at the trial, and a new trial should therefore be required.⁵²

The courts are not in agreement as to the test to be applied in determining the prejudicial effect of failure to comply with the Act where the defendant is not represented by the same counsel on appeal as at trial. One court has held that, rather than requiring reversal for any and all omissions, one of two standards is applied, depending on whether the defendant is represented on appeal by the same attorney who represented him at trial. Where the defendant is represented by the same attorney at trial and on appeal, reversal is called for only if the defendant can show that failure to record and preserve this specific portion of the trial proceedings visits a hardship upon him and prejudices his appeal. Where the defendant is represented by new counsel on appeal, all that need be shown is a substantial and significant omission in the transcript.⁵³ Another court, however, has held that a separate, less demanding test need not be applied when a defendant is represented by new counsel on appeal. Absent a showing by counsel on appeal of a reasonable but unsuccessful effort to determine the substance of the off-the-record remarks and the nature of a claimed error, reversal is not an appropriate remedy. In determining whether hardship or prejudice results from a trial court's failure to record every statement made in open court, the reviewing court must consider all the circumstances in the record surrounding the omission. Generally, failure to record comments made by the judge or counsel to the jury will be viewed with greater disfavor than those made during side bar discussions.⁵⁴

7. WITNESSES [§§ 240-251]

a. EXCLUDING WITNESSES FROM COURTROOM, IN GENERAL [§§ 240-244]

§ 240. Generally

The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester

pletion of notes or records, see 5 Am Jur 2d, Appeal and Error § 977.

Annotations: 12 ALR Fed 584 § 8.

50. *United States v Long* (CA5 Ala) 419 F2d 91, 12 ALR Fed 578.

51. *Parrott v United States* (CA10 Okla) 314 F2d 46.

52. *United States v Workcuff*, 137 App DC 263, 422 F2d 700.

53. *United States v Taylor* (CA5 Tex) 607 F2d

153, reh den (CA5 Tex) 614 F2d 294 and later app (CA5 Tex) 631 F2d 419.

54. *United States v Gallo* (CA6 Ohio) 763 F2d 1504, cert den 474 US 1068, 88 L Ed 2d 798, 106 S Ct 826 and cert den 474 US 1069, 88 L Ed 2d 800, 106 S Ct 828 and cert den 475 US 1017, 89 L Ed 2d 314, 106 S Ct 1200 and (disapproved on other grounds by Ray v United States, 481 US 736, 95 L Ed 2d 693, 107 S Ct 2093) as stated in *United States v Holzer* (CA7 Ill) 848 F2d 822, cert den 488 US 928, 102 L Ed 2d 333, 109 S Ct 315.

witnesses before, during, and after their testimony.⁵⁵ Although discretionary,⁵⁶ sequestration should ordinarily be granted upon request in criminal cases unless sound reasons exist for refusal or exception.⁵⁷ In some jurisdictions, the accused in a criminal trial has an absolute right, granted by statute, to have all witnesses excluded from the courtroom during his trial.⁵⁸

■■■■ *Practice guide:* A separation of the witnesses in a criminal case is seldom denied when requested.⁵⁹

Normally the rule is invoked without ceremony as a routine matter; however, when its use is challenged, the trial judge must determine that its use is proper and then exercise his discretion whether to allow sequestration.⁶⁰

55. *Geders v United States*, 425 US 80, 47 L Ed 2d 592, 96 S Ct 1330; *Tice v Mandel* (ND) 76 NW2d 124; *Crosby v Minneapolis, S.P. & S.S.M.R. Co.*, 57 ND 447, 222 NW 476; *Commonwealth v Turner*, 371 Pa 417, 88 A2d 915, 32 ALR2d 346.

As to exclusion of witnesses under the Federal Rules of Evidence, see 32B Am Jur 2d, Federal Rules of Evidence §§ 348 et seq.

Practice References: Motion to exclude witnesses at trial. 5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases §§ 58, 59; 7 Am Jur Trials 477, Homicide § 132.

Forms: Motion to exclude witnesses from courtroom during trial. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 61.

56. *United States v Shearer* (CA8 Mo) 606 F2d 819, 4 Fed Rules Evid Serv 1434 (disagreed with on other grounds by *United States v Thornberg* (CA8 Minn) 844 F2d 573, cert den 487 US 1240, 101 L Ed 2d 944, 108 S Ct 2913) as stated in *United States v Marin-Cifuentes* (CA8 Minn) 866 F2d 988, 27 Fed Rules Evid Serv 690, cert den (US) 107 L Ed 2d 72, 110 S Ct 110; *United States v Smith* (CA8 Neb) 578 F2d 1227, later app (CA8 Neb) 600 F2d 149; *Camp v General Motors Corp.* (Ala) 454 So 2d 958; *Stinson v State* (Ala App) 341 So 2d 185; *People v Gomez* (Colo) 632 P2d 586, cert den 455 US 943, 71 L Ed 2d 655, 102 S Ct 1439; *Derrickson v State* (Del Sup) 321 A2d 497; *Randolph v State* (Fla) 463 So 2d 186, 10 FLW 27, cert den 473 US 907, 87 L Ed 2d 656, 105 S Ct 3533; *Gore Newspapers Co. v Reasbeck* (Fla App D4) 363 So 2d 609, 4 Media L R 1751; *Thompson v Gross* (Fla App D3) 353 So 2d 191; *Bridges v State*, 242 Ga 251, 248 SE2d 647; *Strozier v State*, 145 Ga App 566, 244 SE2d 89; *Wisehart v State* (Ind) 484 NE2d 949, cert den 476 US 1189, 91 L Ed 2d 556, 106 S Ct 2929; *Toth v State*, 176 Ind App 283, 375 NE2d 256; *Commonwealth v Watkins*, 373 Mass 849, 370 NE2d 701; *People v Walton*, 76 Mich App 1, 255 NW2d 640; *State v Jackson*, 336 Mo 1069, 83 SW2d 87, 103 ALR 339; *State v Newman* (Mo App) 579 SW2d 678;

State v Lindsey, 25 NC App 343, 213 SE2d 434, cert den and app dismd 287 NC 468, 215 SE2d 627; *State v Hudson*, 23 NC App 734, 209 SE2d 542; *Tice v Mandel* (ND) 76 NW2d 124; *Commonwealth v Turner*, 371 Pa 417, 88 A2d 915, 32 ALR2d 346; *Elizabeth River Tunnel Dist. v Beecher*, 202 Va 452, 117 SE2d 685, 85 ALR2d 469.

57. *Derrickson v State* (Del Sup) 321 A2d 497.

The better practice in capital cases is to allow sequestration of witnesses. *Commonwealth v Watkins*, 373 Mass 849, 370 NE2d 701.

The trial judge's statement, in denying defense counsel's request that all witnesses be excluded from the courtroom until after testifying, that he had no reason to believe that the witnesses would shade their testimony was tantamount to a vouching for the credibility of the witnesses. *People v Cutler*, 73 Mich App 313, 251 NW2d 303.

58. *Coonan v Baltimore & O.R. Co.* (DC Pa) 25 F Supp 834, 36 Pa D & C 346; *Cruz v People*, 149 Colo 187, 368 P2d 774; *Hughes v State*, 126 Tenn 40, 148 SW 543; *Martin v Commonwealth*, 217 Va 847, 234 SE2d 62.

59. *Spencer v State* (Fla) 133 So 2d 729, cert den 369 US 880, 8 L Ed 2d 283, 82 S Ct 1155 and cert den 372 US 904, 9 L Ed 2d 730, 83 S Ct 742; *State v McLeod*, 131 Mont 478, 311 P2d 400; *State v Cyrulik*, 100 RI 282, 214 A2d 382; *State v Williams*, 226 SC 525, 85 SE2d 863.

60. *Gore Newspapers Co. v Reasbeck* (Fla App D4) 363 So 2d 609, 4 Media L R 1751 (holding that the granting of the rule of sequestration was improper and the trial judge erred in failing to exercise its discretion by denying the requested invocation of the rule where defense counsel asked the court to place several news reporters under oath as witnesses in the case and exclude them from the courtroom, although it was clear that the reporters were not in fact going to be witnesses and the entire charade was simply a ruse by counsel for the defendant to exclude the press from the proceeding).

Generally, a motion to exclude witnesses need not be granted where no particular reason for the motion exists or is alleged.⁶¹

Although it is generally held that a trial court's exercise of its discretion in granting or denying a request to exclude witnesses will not be disturbed on appeal absent an abuse of discretion,⁶² it has also been held that failure to honor an exclusionary request is presumed prejudicial unless the absence of prejudice is clearly manifest from the record.⁶³

§ 241. Purpose

|||| Definition: The "rule" or act of placing witnesses under the rule means that the witnesses are to be excluded from the courtroom during the testimony of other witnesses, separated from the witnesses, and examined individually during the trial.⁶⁴

Generally, the rule has no application once the witness has testified and he or she may remain in the courtroom or discuss the case with other witnesses who have completed the testimony. The reason for relaxation of the rule after the witness has testified is because if the witness is recalled the purpose will probably be for rebuttal or impeachment and this type witness is, in any event, exempt from the rule. Where the witness is recalled for direct testimony, the witness should remain subject to the rule.⁶⁵

The principal purpose of a separation of witnesses order is to prevent witnesses from hearing their testimony and questioning of other witnesses.⁶⁶ The aim of imposing "the rule on witnesses," as the practice of sequestering witnesses is sometimes called, is two-fold: It exercises a restraint on witnesses tailoring their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.⁶⁷ Sequestering a witness over a recess called before testimony is completed serves a third purpose as well: Preventing improper attempts to influence the testimony in light of the testimony already

61. *McCrosen v United States* (CA10 NM) 339 F2d 810, 11 ALR3d 1268; *Coonan v Baltimore & O.R. Co.* (DC Pa) 25 F Supp 834, 36 Pa D & C 346; *People v Townsend*, 11 Ill 2d 30, 141 NE2d 729, 69 ALR2d 371, cert den 355 US 850, 2 L Ed 2d 60, 78 S Ct 76, reh den 355 US 886, 2 L Ed 2d 116, 78 S Ct 152 and cert den 358 US 887, 3 L Ed 2d 115, 79 S Ct 128; *Tice v Mandel* (ND) 76 NW2d 124; *Commonwealth v Turner*, 371 Pa 417, 88 A2d 915, 32 ALR2d 346.

62. *Camp v General Motors Corp.* (Ala) 454 So 2d 958; *Thompson v Gross* (Fla App D3) 353 So 2d 191; *Bridges v State*, 242 Ga 251, 248 SE2d 647; *Strozier v State*, 145 Ga App 566, 244 SE2d 89; *Roberts v State*, 100 Neb 199, 158 NW 930; *State v Hudson*, 23 NC App 734, 209 SE2d 542; *Commonwealth v Turner*, 371 Pa 417, 88 A2d 915, 32 ALR2d 346; *State v Schapiro*, 28 Wash App 860, 626 P2d 546 (ovrld on other grounds by *State v Fry*, 30 Wash App 638, 638 P2d 585, remanded without op 100 Wash 2d 1019, 670 P2d 661).

In some circumstances, denial of a motion to sequester witnesses who identify the defendant as the perpetrator of the crime is an abuse of

discretion which violates due process even if the identification has an independent basis. *Commonwealth v Lavelle*, 277 Pa Super 518, 419 A2d 1269.

The trial judge did not abuse his discretion in denying the defendant's request that two witnesses be sequestered where the request was made after the state had begun to present its case and the defendant failed to explain why he wanted the witnesses sequestered. *Lindsey Davis v Fleming*, 196 SC 343, 13 SE2d 434.

As to time for exclusion or sequestration, see § 240.

63. *State v Roberts*, 126 Ariz 92, 612 P2d 1055.

64. *State v Upchurch* (Tenn Crim) 620 SW2d 540.

65. *State v Upchurch* (Tenn Crim) 620 SW2d 540.

66. *Solomon v State* (Ind) 439 NE2d 570; *Carter v State* (Ind App) 408 NE2d 790.

67. *Geders v United States*, 425 US 80, 47 L Ed 2d 592, 96 S Ct 1330.

given.⁶⁸ Balanced against the rule, however, is the criminal defendant's Sixth Amendment and due process right to present witnesses in his own behalf.⁶⁹

The rule of sequestration is intended to prevent the shaping of testimony by witnesses.⁷⁰ The purpose of sequestration is to assure that a witness will testify as to his own knowledge.⁷¹ In sum, the purpose of the rule is to prevent corroboration, contradiction, and the influencing of witnesses.⁷²

The rule also serves to strengthen the role of cross-examination in developing the facts.⁷³

Practice guide: Other tactical concerns also compel the practice of sequestering witnesses. The attorney who wishes to take advantage of the negative effect of unfamiliarity with courtroom procedures may find its impact decreased if the witness remains in the courtroom and observes the proceedings. Exclusion also reduces the opportunity of the witnesses to become familiar with questions that may be asked of them on cross-examination as well as techniques used by the attorney. This is especially true when an attorney hopes, by cross-examination, to break down the testimony of an adverse witness. Techniques of cross-examination used against one witness are not as likely to be effective against another witness if the second witness was present during the examination of the first.⁷⁴

§ 242. Time for exclusion or sequestration

In the interests of fairness and impartiality the preferred time to request exclusion of all witnesses is before any witness has testified, but the benefit of sequestration as an aid in detecting inconsistencies and fabrications is too great to automatically deny exclusion simply because the request is made after commencement of trial.⁷⁵

Practice guide: A motion to exclude witnesses should ordinarily be made orally before opening statements so that witnesses will not hear contentions of the parties.⁷⁶

A motion to sequester, whenever made, is addressed to the sound judicial

68. *Geders v United States*, 425 US 80, 47 L Ed 2d 592, 96 S Ct 1330.

69. *Dumas v State* (Fla) 350 So 2d 464.

70. *United States v Johnston* (CA10 Okla) 578 F2d 1352, 3 Fed Rules Evid Serv 1039, cert den 439 US 931, 58 L Ed 2d 325, 99 S Ct 321; *Taylor v United States* (CA9 Wash) 388 F2d 786; *United States v Leggett* (CA4 NC) 326 F2d 613, cert den 377 US 955, 12 L Ed 2d 499, 84 S Ct 1633; *Witt v United States* (CA9 Hawaii) 196 F2d 285, cert den 344 US 827, 97 L Ed 644, 73 S Ct 28; *Young v State* (Ala App) 416 So 2d 1109; *Dumas v State* (Fla) 350 So 2d 464; *Randolph v State* (Fla) 463 So 2d 186, 10 FLW 27, cert den 473 US 907, 87 L Ed 2d 656, 105 S Ct 3533; *Gore Newspapers Co. v Reasbeck* (Fla App D4) 363 So 2d 609, 4 Media L R 1751; *State v Leong*, 51 Hawaii 581, 465 P2d 560; *State v Ortiz* (App) 88 NM 370, 540 P2d 850.

71. *State v Parker* (La) 421 So 2d 834, cert den 460 US 1044, 75 L Ed 2d 799, 103 S Ct 1443; *State v Marchese* (La App 1st Cir) 430 So 2d 1303.

72. *Ex parte Robertson* (Tex Crim) 731 SW2d 564 (further holding that a witness did not violate the rule by describing the conduct occurring in the courtroom as to her treatment, rather than the substance of her testimony).

73. *State v Western* (La) 355 So 2d 1314; *State v Williams* (La) 346 So 2d 181; *State v Marchese* (La App 1st Cir) 430 So 2d 1303.

74. *Charfoos & Christensen*, *Personal Injury Practice* (1986) § 22:2.

75. *Derrickson v State* (Del Sup) 321 A2d 497; *Jones v Division of Administration*, Dept. of Transp. (Fla App D4) 351 So 2d 365.

76. *Purver, Young, Davis & Kerper*, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990), § 22:7.

discretion of the trial judge. It is not per se error for the trial court to order sequestration after some witnesses have been examined.⁷⁷

■■■■ *Reminder:* Although most judges will automatically exclude the witnesses or ask counsel whether they wish to exclude them, it is counsel's responsibility to invoke the rule if desired.⁷⁸

§ 243. Modification of, or exception to, order

The trial judge may modify his exclusion order in the interest of justice, and should he choose to do so his ruling will not be disturbed on appeal absent an abuse of discretion.⁷⁹

Where there is an order for separation or sequestration of the witnesses, exceptions to the rule pertaining to witnesses who are not parties to the case are discretionary with the trial court, and the trial court will not be reversed, whether the witness is excluded or is permitted to remain, unless under the facts of the particular case the trial court has abused that discretion.⁸⁰ Where the rule for the exclusion of witnesses from the courtroom is invoked, it is within the sound discretion of the trial court to allow any one of the witnesses to remain in the courtroom during the examination of the others and the exercise of this discretion is not reviewable on appeal.⁸¹

A trial court should not, however, as a matter of course, permit a witness to remain in the courtroom during the trial when he or she is not on the stand, unless it is shown that it necessary for the witness to assist counsel in the trial and that no prejudice will result to the accused. A hearing to determine these matters should be conducted if the rule excluding and sequestering witnesses has been invoked.⁸²

§ 244. Witnesses within rule

Where the rule regarding the exclusion of witnesses from the courtroom is invoked, unless some good reason is shown, it should apply to all witnesses.⁸³ However, some exceptions to the rule are generally recognized. For example,

77. *Derrickson v State* (Del Sup) 321 A2d 497.

78. *Danner & Toothman, Trial Practice Checklists* (1989) § 8:20.

79. *State v Williams* (La) 346 So 2d 181 (further holding that the defendant was not prejudiced by the trial court's allowing the prosecuting witness to remain in the courtroom during the course of the trial where the salient portions of the prosecuting witness's testimony were based solely upon facts within his own knowledge and could not have been influenced by the statements of other witnesses); *State v Marchese* (La App 1st Cir) 430 So 2d 1303.

80. *Simonds v Conair Corp.*, 185 Ga App 664, 365 SE2d 507, CCH Prod Liab Rep ¶ 11716.

The trial court acted within its discretion in excluding the defendant's father from the courtroom during trial and in denying the defendant's request to exempt his father from the rule excluding witnesses from the courtroom on the ground that his father had been appointed his legal guardian before trial where the defendant was an adult and found by a jury

to be competent to stand trial. *Abdnor v State* (Tex App Dallas) 756 SW2d 815, petition for discretionary review gr and revd on other grounds (Tex Crim) 1991 Tex Crim App LEXIS 69.

81. *Young v State* (Ala App) 416 So 2d 1109.

Permitting a welfare worker to remain in the courtroom during the testimony of an infant prosecutrix in a prosecution for statutory rape did not constitute error, where it did not appear that the later testimony of the welfare worker had been influenced by that of the prosecutrix, or that the presence of the welfare worker had influenced the testimony of the prosecutrix, to the prejudice of the defendant. *Huddleston v Commonwealth*, 191 Va 400, 61 SE2d 276.

82. *Randolph v State* (Fla) 463 So 2d 186, 10 FLW 27, cert den 473 US 907, 87 L Ed 2d 656, 105 S Ct 3533.

83. *Squires v State*, 39 Tex Crim 96, 45 SW 147.

the rule does not apply to a party to the action,⁸⁴ including one who is a party as a next friend and guardian,⁸⁵ at least not unless the litigant has been given the alternative of testifying first or leaving the courtroom,⁸⁶ even though there may be several parties on one side of the case.⁸⁷ The same is true of one directly interested in the result of the trial.⁸⁸

■■■■ Observation: A sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial. A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. Moreover, "the rule" accomplishes less when applied to the defendant rather than a nonparty witness, because the defendant as a matter of right can be and usually is present for all testimony and has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand.⁸⁹

The rule is inapplicable to an attorney for one of the parties,⁹⁰ even where the party is also represented by other attorneys,⁹¹ although the action of the trial court in excluding one of the attorneys for a party has been upheld,⁹² or the failure to exclude him where he is also a witness, at least disapproved.⁹³

Both the rule and its underlying legislative history clearly establish that an investigative agent need not be excluded when the agent merely assists counsel in the preparation of a case.⁹⁴ Thus, an exception to the rule has been applied in favor of a detective attached to the office of the prosecuting attorney or other officer whose duty it is to assist the prosecuting attorney in preparing cases,⁹⁵ but not to a police officer witness.⁹⁶ Also customarily excepted from the operation of the exclusion rule, if the court so directs, are a complaining witness, a sheriff, undersheriff, and a peace officer assisting the prosecutor.⁹⁷

84. *Coonan v Baltimore & O.R. Co.* (DC Pa) 25 F Supp 834, 36 Pa D & C 346; *Georgia R. & B. Co. v Tice*, 124 Ga 459, 52 SE 916; *Hughes v State*, 126 Tenn 40, 148 SW 543.

85. *Darling v Charleston Community Memorial Hospital* (4th Dist) 50 Ill App 2d 253, 200 NE2d 149, *affd* 33 Ill 2d 326, 211 NE2d 253, 14 ALR3d 860, *cert den* 383 US 946, 16 L Ed 2d 209, 86 S Ct 1204.

86. *Moore v Chambers* (Miss) 199 So 2d 261.

87. *Georgia R. & B. Co. v Tice*, 124 Ga 459, 52 SE 916; *Richards v State*, 91 Tenn 723, 20 SW 533.

88. *Hughes v State*, 126 Tenn 40, 148 SW 543.

89. *Geders v United States*, 425 US 80, 47 L Ed 2d 592, 96 S Ct 1330.

90. *Hughes v State*, 126 Tenn 40, 148 SW 543; *Jackson v State*, 55 Tex Crim 79, 115 SW 262.

91. *Jackson v State*, 55 Tex Crim 79, 115 SW 262.

92. *Berberet v Electric Park Amusement Co.*, 319 Mo 275, 3 SW2d 1025, 61 ALR 1269.

93. *Charles P.B. Pinson, Inc. v Federal Communications Com.*, 116 App DC 106, 321 F2d 372.

94. *United States v Shearer* (CA8 Mo) 606 F2d 819, 4 Fed Rules Evid Serv 1434 (disagreed with on other grounds by *United States v Thornberg* (CA8 Minn) 844 F2d 573, *cert den* 487 US 1240, 101 L Ed 2d 944, 108 S Ct 2913) as stated in *United States v Marin-Ci-fuentes* (CA8 Minn) 866 F2d 988, 27 Fed Rules Evid Serv 690, *cert den* (US) 107 L Ed 2d 72, 110 S Ct 110; *Pless v State*, 142 Ga App 594, 236 SE2d 842.

95. *State v Ede*, 167 Or 640, 117 P2d 235; *Hughes v State*, 126 Tenn 40, 148 SW 543.

96. *State v Bishop*, 7 Or App 558, 492 P2d 509.

97. *State v Thomas*, 78 Ariz 52, 275 P2d 408 (ovrld on other grounds by *State v Pina*, 94 Ariz 243, 383 P2d 167); *Spencer v State* (Fla) 133 So 2d 729, *cert den* 369 US 880, 8 L Ed 2d 283, 82 S Ct 1155 and *cert den* 372 US

While it is usual also to except expert witnesses from the operation of the rule because they do not testify as to facts of the case but only give their opinion based upon hypothetical facts,⁹⁸ a refusal to do so does not necessarily constitute error.⁹⁹ Where a party seeks to exempt an expert witness from the exclusionary rule on the ground that he or she may be assisted by being present to hear the testimony upon which he is expected to base his expert opinion, the decision is within the discretion of the trial judge, which should not normally be disturbed on appeal.¹

Witnesses in rebuttal do not go under the rule.²

A corporation's representative is not to be excluded even if he is a witness in the suit.³

b. VIOLATION OF RULE OF EXCLUSION [§§ 245-251]

§ 245. Generally

Enforcement of a statutory right to exclusion of witnesses is vested in the discretion of the trial court.⁴ It is also within the discretion of the trial court to determine whether a sequestration order has been violated.⁵

The controlling consideration in determining what remedy is appropriate when the rule excluding witnesses is violated is prejudice to the complaining party.⁶ In exercising its discretion, the trial court should consider the seriousness of the violation, its impact on the testimony of the witness, and its probable impact on the outcome of the trial.⁷ The court must also consider the subject matter of the violation in conjunction with the substance of the disobedient witness' testimony.⁸

Practice guide: When infractions of a sequestration order occur, a court has three possible sanctions. First, the guilty party, be it a witness, a party to the action, or counsel, may be cited for contempt. Second, the court may allow opposing counsel to cross-examine the witness as to the

904, 9 L Ed 2d 730, 83 S Ct 742; *Cornett v State*, 218 Ga 405, 128 SE2d 317.

98. *Lewis v Owen* (CA10 Okla) 395 F2d 537; *Maryland Casualty Co. v De Vilbiss Co.* (La App 2d Cir) 323 So 2d 871.

Annotations: Exclusion from courtroom of expert witnesses during taking of testimony in civil case, 85 ALR2d 478 § 3.

99. *Elizabeth River Tunnel Dist. v Beecher*, 202 Va 452, 117 SE2d 685, 85 ALR2d 469.

Annotations: 85 ALR2d 478 § 4.

1. *Arkansas Power & Light Co. v Melkovitz*, 11 Ark App 90, 668 SW2d 37.

2. *Hughes v State*, 126 Tenn 40, 148 SW 543.

3. *Maryland Casualty Co. v De Vilbiss Co.* (La App 2d Cir) 323 So 2d 871.

4. *United States v Smith* (CA8 Neb) 578 F2d 1227, later app (CA8 Neb) 600 F2d 149; *People v Johnson* (Colo App) 757 P2d 1098; *Pless v State*, 142 Ga App 594, 236 SE2d 842; *Harkins v Ikeda*, 57 Hawaii 378, 557 P2d 788;

Rinard v State, 265 Ind 56, 351 NE2d 20; *Toth v State*, 176 Ind App 283, 375 NE2d 256; *State v Jones* (La) 354 So 2d 530; *State v Ortiz* (App) 88 NM 370, 540 P2d 850; *Commonwealth v Smith*, 464 Pa 314, 346 A2d 757; *Commonwealth v Gibson*, 245 Pa Super 103, 369 A2d 314; *State v Schapiro*, 28 Wash App 860, 626 P2d 546 (ovrld on other grounds by *State v Fry*, 30 Wash App 638, 638 P2d 585, remanded without op 100 Wash 2d 1019, 670 P2d 661).

5. *United States v Smith* (CA8 Neb) 578 F2d 1227, later app (CA8 Neb) 600 F2d 149.

6. *Rinard v State*, 265 Ind 56, 351 NE2d 20; *State v Ortiz* (App) 88 NM 370, 540 P2d 850; *Commonwealth v Gibson*, 245 Pa Super 103, 369 A2d 314.

7. *Commonwealth v Smith*, 464 Pa 314, 346 A2d 757; *Commonwealth v Gibson*, 245 Pa Super 103, 369 A2d 314.

8. *People v Johnson* (Colo App) 757 P2d 1098.

nature of the violation. Third, where the defendants have suffered actual prejudice, and there has been connivance by the witness or counsel to violate the rule, the court may strike testimony already given or disallow further testimony.⁹

The trial court's broad discretion in handling these matters will not be controlled unless it is manifestly abused.¹⁰

§ 246. Effect on reception of testimony

Failure of a witness to comply with the sequestration rule does not of itself render his testimony inadmissible,¹¹ or render the witness incompetent to testify,¹² although it may affect the weight of the testimony.¹³ Whether such a witness is to be permitted to testify is generally left to the sound discretion of the trial court.¹⁴ The trial judge's ruling will not be reversed on appeal absent

9. *United States v Blasco* (CA11 Fla) 702 F2d 1315, 13 Fed Rules Evid Serv 479, habeas corpus proceeding (SD Fla) 587 F Supp 567, *affd* (CA11 Fla) 782 F2d 928, *reh den*, *en banc* (CA11 Fla) 788 F2d 1570 and *cert den* 464 US 914, 78 L Ed 2d 256, 104 S Ct 275, 104 S Ct 276.

10. *Pless v State*, 142 Ga App 594, 236 SE2d 842; *Rinard v State*, 265 Ind 56, 351 NE2d 20; *Commonwealth v Smith*, 464 Pa 314, 346 A2d 757; *Commonwealth v Gibson*, 245 Pa Super 103, 369 A2d 314; *State v Schapiro*, 28 Wash App 860, 626 P2d 546 (*ovrld* on other grounds by *State v Fry*, 30 Wash App 638, 638 P2d 585, *remanded without op* 100 Wash 2d 1019, 670 P2d 661).

11. *United States v Walker* (CA5 La) 613 F2d 1349, 5 Fed Rules Evid Serv 983, *cert den* 446 US 944, 64 L Ed 2d 800, 100 S Ct 2172 and *cert den* 446 US 955, 64 L Ed 2d 813, 100 S Ct 2925; *Pless v State*, 142 Ga App 594, 236 SE2d 842.

Not every violation of the sequestration order must result in the exclusion of the witness' testimony. *State v Parker* (La) 421 So 2d 834, *cert den* 460 US 1044, 75 L Ed 2d 799, 103 S Ct 1443; *State v Marchese* (La App 1st Cir) 430 So 2d 1303.

12. *United States v Smith* (CA8 Neb) 578 F2d 1227, *later app* (CA8 Neb) 600 F2d 149; *State v Schlaefli*, 117 Ariz 1, 570 P2d 772 (*ovrld* on other grounds by *State v Roberts*, 126 Ariz 92, 612 P2d 1055); *Pearley v State*, 235 Ga 276, 219 SE2d 404.

13. *United States v Walker* (CA5 La) 613 F2d 1349, 5 Fed Rules Evid Serv 983, *cert den* 446 US 944, 64 L Ed 2d 800, 100 S Ct 2172 and *cert den* 446 US 955, 64 L Ed 2d 813, 100 S Ct 2925.

14. *Holder v United States*, 150 US 91, 37 L Ed 1010, 14 S Ct 10; *United States v Jimenez* (CA11 Fla) 780 F2d 975, 19 Fed Rules Evid Serv 1674; *United States v Nash* (CA5 Miss) 649 F2d 369; *United States v Walker* (CA5 La)

613 F2d 1349, 5 Fed Rules Evid Serv 983, *cert den* 446 US 944, 64 L Ed 2d 800, 100 S Ct 2172 and *cert den* 446 US 955, 64 L Ed 2d 813, 100 S Ct 2925; *United States v Johnston* (CA10 Okla) 578 F2d 1352, 3 Fed Rules Evid Serv 1039, *cert den* 439 US 931, 58 L Ed 2d 325, 99 S Ct 321; *United States v Willis* (CA5 Ga) 525 F2d 657; *Taylor v United States* (CA9 Wash) 388 F2d 786; *Montgomery v State* (Ala App) 446 So 2d 697, *cert den* 469 US 916, 83 L Ed 2d 227, 105 S Ct 291; *State v Stolze*, 112 Ariz 124, 539 P2d 881; *Cantrell v State*, 265 Ark 263, 577 SW2d 605; *People v Wright* (Colo App) 678 P2d 1072; *Jenkins v State* (Del Sup) 413 A2d 874; *Brown v United States* (Dist Col App) 388 A2d 451; *Pearley v State*, 235 Ga 276, 219 SE2d 404; *People v Farnsley*, 53 Ill 2d 537, 293 NE2d 600; *Morgan v State* (Ind) 544 NE2d 143; *State v Handley*, 234 Kan 454, 673 P2d 1155; *Dennis v Commonwealth* (Ky) 464 SW2d 253; *State v Narcisse* (La) 426 So 2d 118, *cert den* 464 US 865, 78 L Ed 2d 176, 104 S Ct 202, *application den* 464 US 957, 78 L Ed 2d 334, 104 S Ct 389 and *reh den* 464 US 1004, 78 L Ed 2d 702, 104 S Ct 515; *State v Western* (La) 355 So 2d 1314; *State v Callo-way* (La) 343 So 2d 694; *State v Baker* (La) 338 So 2d 1372; *State v Wills*, 260 La 707, 257 So 2d 378; *State v Pickering* (Me) 491 A2d 560; *Brown v State*, 272 Md 450, 325 A2d 557; *Pierce v State*, 34 Md App 654, 369 A2d 140, *cert den* 280 Md 732 and *cert den* 280 Md 734 and *cert den* 434 US 907, 54 L Ed 2d 194, 98 S Ct 307 and (*disapproved* on other grounds by *Stevenson v State*, 289 Md 167, 423 A2d 558, *later proceeding* 299 Md 297, 473 A2d 450) as stated in *Woodland v State*, 62 Md App 503, 490 A2d 286, *cert den* 304 Md 96, 497 A2d 819; *Commonwealth v Jackson*, 384 Mass 572, 428 NE2d 289, *later proceeding* 391 Mass 749, 464 NE2d 946; *People v Gonyea*, 126 Mich App 177, 337 NW2d 325, *revd* on other grounds 421 Mich 462, 365 NW2d 136; *Yates v Jackson* (Miss) 443 So 2d 16; *Stanford v Morgan* (Mo App) 588 SW2d 89; *State v Newman* (Mo App) 579 SW2d 678; *State v Swillie*, 218

a clear showing of an abuse of discretion.¹⁵

It is well settled that it is within the discretion of the court to permit a witness to testify, even though such witness has violated the court's separation of witnesses order.¹⁶

■■■■ Observation: It has been stated that the power to exclude the testimony of a witness who has violated the rule should be rarely exercised. While the witness is subject to punishment for contempt and the adverse party is free, in argument to the jury, to raise an issue as to his credibility by reason of his conduct, the party, who is innocent of the rule's violation, should not ordinarily be deprived of his testimony.¹⁷

To exclude altogether a witness who has violated the rule of exclusion might deprive a party of the only witness by which a fact in issue might be established.¹⁸ Indeed, one court has gone so far as to hold that, in the interest of clarity and uniformity, in conformity with the trend toward witness competency, and in view of the constitutional rights of a defendant to call witnesses

Neb 551, 357 NW2d 212; *State v Simonson*, 100 NM 297, 669 P2d 1092; *Re Unauthorized Practice of Law*, 175 Ohio St 149, 23 Ohio Ops 2d 445, 192 NE2d 54, 2 ALR3d 712, cert den 376 US 970, 12 L Ed 2d 85, 84 S Ct 1136, reh den 377 US 940, 12 L Ed 2d 304, 84 S Ct 1332; *State v Morris* (Cuyahoga Co) 8 Ohio App 3d 12, 8 Ohio BR 13, 455 NE2d 1352, motion overr; *Soap v State* (Okla Crim) 562 P2d 889; *Commonwealth v Barber*, 275 Pa Super 144, 418 A2d 653; *State v Hall*, 268 SC 524, 235 SE2d 112; *State v Upchurch* (Tenn Crim) 620 SW2d 540; *Garza v Cole* (Tex App Houston (14th Dist)) 753 SW2d 245, writ r e (Oct 7, 1987); *Leache v State*, 22 Tex App 279, 3 SW 539; *State v Carlson* (Utah) 635 P2d 72; *State v Grant*, 77 Wash 2d 47, 459 P2d 639; *State v Steele* (W Va) 359 SE2d 558; *Nyberg v State*, 75 Wis 2d 400, 249 NW2d 524.

The trial judge properly ruled that it was the plaintiff's responsibility to keep her witness out of the courtroom while he was sequestered, and therefore properly refused to allow the witness who had violated the sequestration of witnesses rule. *Benoit v Camelle* (La App 3d Cir) 300 So 2d 850, cert den (La) 304 So 2d 668.

The trial judge acted within his discretion in a custody action in excluding the testimony of the child's grandmother where, on motion of the mother's attorney, he had ordered that all the witnesses be sequestered and the grandmother, who was not a party to the action, was present in the courtroom throughout the trial. *Custody of a Minor*, 392 Mass 719, 467 NE2d 1286.

Annotations: Effect of witness's violation of order of exclusion, 14 ALR3d 16 §§ 3, 4.

15. *United States v Schaefer* (CA7 Ill) 299 F2d 625, 14 ALR3d 1, cert den 370 US 917, 8

L Ed 2d 497, 82 S Ct 1553; *Cruz v People*, 149 Colo 187, 368 P2d 774; *Pearley v State*, 235 Ga 276, 219 SE2d 404; *Needy v Sparks* (1st Dist) 51 Ill App 3d 350, 9 Ill Dec 70, 366 NE2d 327; *Solomon v State* (Ind) 439 NE2d 570; *O'Conner v State*, 272 Ind 460, 399 NE2d 364; *State v Calloway* (La) 343 So 2d 694; *Re Unauthorized Practice of Law*, 175 Ohio St 149, 23 Ohio Ops 2d 445, 192 NE2d 54, 2 ALR3d 712, cert den 376 US 970, 12 L Ed 2d 85, 84 S Ct 1136, reh den 377 US 940, 12 L Ed 2d 304, 84 S Ct 1332; *Leache v State*, 22 Tex App 279, 3 SW 539; *Brickhouse v Commonwealth*, 208 Va 533, 159 SE2d 611, 40 ALR3d 219.

According to some authority, automatic prohibition of testimony without a determination as to whether the violation of the sequestration order was prejudicial amounts to an abuse of discretion. *Ballard v Commonwealth* (Ky) 743 SW2d 21.

16. *Needy v Sparks* (1st Dist) 51 Ill App 3d 350, 9 Ill Dec 70, 366 NE2d 327; *Solomon v State* (Ind) 439 NE2d 570; *Brannum v State*, 267 Ind 51, 366 NE2d 1180; *Sleck v State*, 175 Ind App 22, 369 NE2d 963.

17. *Williams v State*, 258 Ark 207, 523 SW2d 377 (diverged from by *Hendrickson v State*, 290 Ark 319, 719 SW2d 420).

18. *Pearley v State*, 235 Ga 276, 219 SE2d 404; *Pless v State*, 142 Ga App 594, 236 SE2d 842.

The trial court erred in instructing the jury to ignore testimony of a witness and refusing to allow that witness to complete his testimony because of witness' violation of a sequestration order where that witness was the only person present other than the defendant whose version of a shooting coincided with or supported the defendant's contention. *Wright v State*, 246 Ga 53, 268 SE2d 645.

in his or her defense, a witness who has violated the rule of sequestration in a criminal case shall not be prevented from testifying.¹⁹

A codefendant cannot be excluded from testifying on the theory that he comes within the witness rule of sequestration.²⁰

Specific statutory provisions dealing with the effect of the violation of the exclusion order in certain circumstances exist in some jurisdictions.²¹ For example, some statutes provide that a witness cannot be excluded because of a mere irregularity,²² or that admission of testimony of a witness who has disobeyed the rule in a criminal case will lie in the discretion of the court.²³

§ 247. —Constitutional ramifications

The rule of sequestration is a procedural device available to purify trial testimony when counsel for either side believes it to be advantageous. The rule must be invoked in the first instance by counsel. In the Anglo-American system of jurisprudence, no trial is invalid simply because one or more potential witnesses hear the testimony of other witnesses. The court will no more automatically bar the testimony of witnesses who have not been placed under the rule than it will prevent a defendant from testifying on his own behalf simply because he has heard all the testimony in his trial before he takes the stand. When confronted with the Sixth Amendment right, then, a mere violation of the rule must give way.²⁴

Although the action to be taken in the face of a violation of the sequestration order rests within the sound discretion of the trial judge, the discretion in this regard is not unlimited. Although the practice of allowing trial judges to enforce sequestration by excluding testimony of disobedient witnesses reflects a legitimate state interest in preventing testimonial influence, that interest is not sufficient to override the defendant's rights to have compulsory process and to present a defense under either the federal or the state constitutions. This is not to imply that there may be no risk of a witness coloring his testimony to conform to what has gone before. The adversary system reposes

19. *Jordan v State*, 247 Ga 328, 276 SE2d 1265, 224, habeas corpus proceeding (CA11 Ga) 763 F2d 1265.

As to the constitutional ramifications of excluding the testimony of a witness who has violated a sequestration order, see § 247.

20. *In Interest of B.* (Fla App D4) 374 So 2d 1162.

21. *Watts v State*, 239 Ga 725, 238 SE2d 894; *Shelton v State*, 220 Ga 610, 140 SE2d 839, ans conformed to 111 Ga App 351, 141 SE2d 776, cert den 382 US 917, 15 L Ed 2d 232, 86 S Ct 291; *McKeever v State*, 118 Ga App 386, 163 SE2d 919; *State v Lewis* (La) 367 So 2d 1155 (ovrld on other grounds by *State v Holden* (La) 375 So 2d 1372 (ovrld by *State v Martin* (La) 427 So 2d 1182, later proceeding (La) 462 So 2d 637)); *State v Badon* (La) 338 So 2d 665; *State v Batts* (La) 324 So 2d 415; *State v Holmes* (La) 305 So 2d 409; *State v Evans*, 249 La 861, 192 So 2d 103, cert den 389 US 887, 19 L Ed 2d 187, 88 S Ct 110, reh den 389 US 998, 19 L Ed 2d 507, 88 S Ct 483;

State v Wilkerson (La App 2d Cir) 448 So 2d 1355, cert den, prohibition den, mand den (La) 450 So 2d 361; *State v White* (La App 2d Cir) 446 So 2d 1317, cert den (La) 450 So 2d 957.

Annotations: 14 ALR3d 16 § 8.

22. *Watts v State*, 239 Ga 725, 238 SE2d 894; *McKeever v State*, 118 Ga App 386, 163 SE2d 919; *Palmer v Stevens*, 115 Ga App 398, 154 SE2d 803.

23. *State v Lewis* (La) 367 So 2d 1155 (ovrld on other grounds by *State v Holden* (La) 375 So 2d 1372 (ovrld by *State v Martin* (La) 427 So 2d 1182, later proceeding (La) 462 So 2d 637)); *State v Badon* (La) 338 So 2d 665; *State v Batts* (La) 324 So 2d 415.

24. *Duma v State* (Fla) 350 So 2d 464.

It is error to refuse to permit a defense witness to testify, under an order excluding witnesses from the courtroom, since by doing so the defendant is denied his constitutional right to have witnesses testify in his favor. *State v Leong*, 51 Hawaii 581, 465 P2d 560.

judgment of the credibility of all witnesses in the jury. Excluding the witnesses' testimony, in the absence of a sequestration violation with the consent or knowledge of the defendant or his counsel, is not a constitutionally permissible means of insuring reliable testimony.²⁵

A District Court did not commit reversible error in refusing to allow the defendant's wife to testify after she violated the sequestration of witnesses order where the defendant's wife's testimony could not have been exculpatory, and thus, neither the defendant's Sixth Amendment right to a fair trial, nor his right to due process was violated.²⁶

§ 248. —Particular factors as affecting reception

A witness who violates the rule of exclusion is usually to be disqualified only under particular or special circumstances.²⁷ Regardless of the underlying theoretical considerations, courts tend to admit the testimony of the violating witness, except in those instances in which the violation occurred with the knowledge or consent of the party or counsel,²⁸ or in which there was evidence of such an extreme want of diligence on their part to see that the exclusion order was observed as to raise a suspicion of "constructive" knowledge.²⁹

To bolster their conclusion that the testimony of the violating witness was properly admitted or should have been admitted, the courts have mentioned various factors, such as the absence of connivance or collusion on the part of the party or counsel,³⁰ or the fact that the violation occurred unintentionally

25. *State v Jones* (La) 354 So 2d 530.

26. *United States v Nash* (CA5 Miss) 649 F2d 369.

27. *United States v Smith* (CA8 Neb) 578 F2d 1227, later app (CA8 Neb) 600 F2d 149.

28. *United States v Blasco* (CA11 Fla) 702 F2d 1315, 13 Fed Rules Evid Serv 479, habeas corpus proceeding (SD Fla) 587 F Supp 567, affd (CA11 Fla) 782 F2d 928, reh den, en banc (CA11 Fla) 788 F2d 1570 and cert den 464 US 914, 78 L Ed 2d 256, 104 S Ct 275, 104 S Ct 276; *Reeves v International Tel. & Tel. Corp.* (CA5 La) 616 F2d 1342, 24 BNA WH Cas 735, 89 CCH LC ¶ 33912, 29 FR Serv 2d 824, cert den (US) 449 US 1077, 66 L Ed 2d 800, 101 S Ct 857, 24 BNA WH Cas 1189, 90 CCH LC ¶ 33970 and (disagreed with on other grounds by *Walton v United Consumers Club, Inc.* (CA7 Ind) 786 F2d 303, 27 BNA WH Cas 962, 20 Fed Rules Evid Serv 369); *United States v Schaefer* (CA7 Ill) 299 F2d 625, 14 ALR3d 1, cert den 370 US 917, 8 L Ed 2d 497, 82 S Ct 1553; *Robinson v Tennessee* (ED Tenn) 340 F Supp 82, affd (CA6 Tenn) 474 F2d 1273, cert den 414 US 848, 38 L Ed 2d 96, 94 S Ct 137; *Government of Virgin Islands v Roberts* (DC VI) 84 FRD 111, 5 Fed Rules Evid Serv 643; *Chatman v State* (Ala App) 380 So 2d 351; *Showers v State* (Fla App D2) 364 So 2d 848; *State v Trahan* (La App 3d Cir) 543 So 2d 984 (disapproved on other grounds by *State v Simpson* (La) 551 So 2d 1303, later app (La) 565 So 2d 427, reh den (La) 566 So 2d 993

and reh den (La) 1990 La LEXIS 1845) and cert gr (La) 556 So 2d 1252 and affd (La) 576 So 2d 1.

Annotations: Effect of witness' violation of order of exclusion, 14 ALR3d 16 § 10.

29. *United States v Calhoun* (CA7 Ind) 510 F2d 861, cert den 421 US 950, 44 L Ed 2d 104, 95 S Ct 1683; *Booker v Israel* (ED Wis) 610 F Supp 1310; *Ex parte Faircloth* (Ala) 471 So 2d 493; *McElroy v State*, 154 Ga App 638, 269 SE2d 497; *Rice v Commonwealth* (Ky) 387 SW2d 4; *State v Calloway* (La) 343 So 2d 694; *McKnight v State*, 33 Md App 280, 364 A2d 116, revd on other grounds 280 Md 604, 375 A2d 551.

Annotations: 14 ALR3d 16 § 11[b].

30. *Barnard v Henderson* (CA5 La) 514 F2d 744, later app (CA5 La) 531 F2d 1332; *Braswell v Wainwright* (CA5 Fla) 463 F2d 1148; *Taylor v United States* (CA9 Wash) 388 F2d 786; *United States v Bostic* (CA6 Ohio) 327 F2d 983; *Faircloth v State* (Ala App) 471 So 2d 485, affd (Ala) 471 So 2d 493; *Cantrell v State*, 265 Ark 263, 577 SW2d 605; *Williams v State*, 258 Ark 207, 523 SW2d 377 (diverged from by *Hendrickson v State*, 290 Ark 319, 719 SW2d 420); *Derrickson v State* (Del Sup) 321 A2d 497; *Steinhorst v State* (Fla) 412 So 2d 332, habeas corpus proceeding (Fla) 477 So 2d 537, 10 FLW 536, post-conviction proceeding (Fla) 574 So 2d 1075, 16 FLW S126; *Dumas v State* (Fla) 350 So 2d 464; *People v Carroll* (2d Dist) 50 Ill App 3d 946, 8 Ill Dec 890, 365 NE2d

on the part of the witness,³¹ that the witness appeared not to have heard the testimony of other witnesses,³² that the testimony heard by the witness related to other matters only,³³ that the witness was not influenced by the testimony heard,³⁴ that the witness learned nothing as a result of his violation,³⁵ or that

1352; Halbig v State (Ind) 525 NE2d 288; Gorman v State (Ind) 463 NE2d 254; Hudgins v State (Ind) 451 NE2d 1087; Solomon v State (Ind) 439 NE2d 570; Cox v State (Ind) 419 NE2d 737; Brannum v State, 267 Ind 51, 366 NE2d 1180; McCoy v State, 241 Ind 104, 170 NE2d 43; Rowe v State (Ind App) 496 NE2d 585; Sleck v State, 175 Ind App 22, 369 NE2d 963; State v Johns, 237 Kan 402, 699 P2d 538; State v Armstead (La) 432 So 2d 837; State v Boutte (La) 384 So 2d 773 (ovrld on other grounds by State v Roy (La) 395 So 2d 664); State v Allen (La App 4th Cir) 431 So 2d 808; State v Fortune (Mo App) 607 SW2d 451; State v Wells, 202 Mont 337, 658 P2d 381; State v Slone (Franklin Co) 40 Ohio App 2d 523, 69 Ohio Ops 2d 453, 320 NE2d 720, later app (Franklin Co) 45 Ohio App 2d 24, 74 Ohio Ops 2d 66, 340 NE2d 413; State v Burdge, 295 Or 1, 664 P2d 1076; Commonwealth v Scott, 496 Pa 78, 436 A2d 161; Webb v State (Tex Crim) 766 SW2d 236; State v Whalon, 1 Wash App 785, 464 P2d 730, review den 78 Wash 2d 992.

It has been held to be prejudicial error to refuse to permit a witness to testify where the party calling the witness is not at fault for such violation. Brannum v State, 267 Ind 51, 366 NE2d 1180; United States v Schaefer (CA7 Ill) 299 F2d 625, 14 ALR3d 1, cert den 370 US 917, 8 L Ed 2d 497, 82 S Ct 1553; State v Shay (Mo) 339 SW2d 799; State v Booth (CP) 21 Ohio Ops 2d 90, 90 Ohio L Abs 33, 185 NE2d 466.

Absent any evidence that the testimony was tainted by the violation of the sequestration order, the trial judge may properly rule that the testimony should not be precluded. State v Parker (La) 421 So 2d 834, cert den 460 US 1044, 75 L Ed 2d 799, 103 S Ct 1443.

Annotations: 14 ALR3d 16 § 12.

31. United States v Schaefer (CA7 Ill) 299 F2d 625, 14 ALR3d 1, cert den 370 US 917, 8 L Ed 2d 497, 82 S Ct 1553; United States v Sanders (ED Pa) 322 F Supp 947, affd (CA3 Pa) 459 F2d 86, cert den 409 US 860, 34 L Ed 2d 106, 93 S Ct 146; Schroff v State (Alaska App) 627 P2d 653; Rollins v State (Fla App D4) 256 So 2d 541; Hayes v State, 175 Ga App 135, 332 SE2d 917; Morgan v State, 161 Ga App 67, 288 SE2d 836; Needy v Sparks (1st Dist) 51 Ill App 3d 350, 9 Ill Dec 70, 366 NE2d 327; Smith v State (Ind) 420 NE2d 1225; Davis v State (Ind App) 398 NE2d 704; State v McKinney (La) 302 So 2d 917; State v White (La App 3d Cir) 508 So 2d 982, cert den (La)

512 So 2d 1184; People v Boles, 127 Mich App 759, 339 NW2d 249, revd on other grounds 420 Mich 851, 358 NW2d 894; State v Wells, 202 Mont 337, 658 P2d 381; Commonwealth v Mokluk, 298 Pa Super 360, 444 A2d 1214; Commonwealth v Gibson, 245 Pa Super 103, 369 A2d 314; Brickhouse v Commonwealth, 208 Va 533, 159 SE2d 611, 40 ALR3d 219.

Annotations: 14 ALR3d 16 § 14.

32. Clubb v State, 230 Ark 688, 326 SW2d 816; Hood v State, 157 Ga App 282, 277 SE2d 261; Trade City G.M.C., Inc. v May, 154 Ga App 371, 268 SE2d 421; Grimes v State, 258 Ind 257, 280 NE2d 575; State v McKinney (La) 302 So 2d 917; State v Daigle (La App 1st Cir) 439 So 2d 595; McKay v Tulsa (Okla Crim) 763 P2d 703; Commonwealth v Smith, 424 Pa 9, 225 A2d 691.

Annotations: 14 ALR3d 16 § 15.

33. United States v Robbins (CA9 Wash) 579 F2d 1151; Weedin v United States (CA9 Wash) 380 F2d 657; Pless v State, 142 Ga App 594, 236 SE2d 842; State v Wilson (La) 360 So 2d 166 (ovrld on other grounds by State v Curtis (La) 363 So 2d 1375, habeas corpus proceeding (La) 373 So 2d 545, habeas corpus proceeding (CA5 La) 748 F2d 1047, post-conviction proceeding (La) 541 So 2d 889, habeas corpus proceeding (ED La) 755 F Supp 153); State v Lewis (La) 288 So 2d 324; State v White (La App 3d Cir) 508 So 2d 982, cert den (La) 512 So 2d 1184; State v Burge (La App 1st Cir) 486 So 2d 855, cert den (La) 493 So 2d 1204; State v Jackson (La App 4th Cir) 482 So 2d 807; State v Borel (La App 3d Cir) 473 So 2d 928; State v Morgan (La App 4th Cir) 454 So 2d 364; State v Wilkerson (La App 2d Cir) 448 So 2d 1355, cert den, prohibition den, mand den (La) 450 So 2d 361; People v Boose, 109 Mich App 455, 311 NW2d 390; State v Scott (Mo) 299 SW2d 526.

Annotations: 14 ALR3d 16 § 16[b].

34. United States v Johnson (CA6 Ohio) 345 F2d 457, cert den 382 US 836, 15 L Ed 2d 79, 86 S Ct 83, reh den 382 US 1000, 15 L Ed 2d 490, 86 S Ct 531; Florida Motor Lines Corp. v Barry, 158 Fla 123, 27 So 2d 753; Hayes v State, 175 Ga App 135, 332 SE2d 917; Anthony v State, 274 Ind 206, 409 NE2d 632; State v Pierce (Iowa) 287 NW2d 570; Gwaltney v Morris, 237 Md 173, 205 A2d 266.

Annotations: 14 ALR3d 16 § 16[a].

35. Frazier v Waterman S.S. Corp., 206 Md 434, 112 A2d 221.

he testified merely in rebuttal.³⁶

§ 249. —Admission or exclusion as prejudicial or harmless error

Where a witness has erroneously not been allowed to give testimony by reason of his violation of an exclusion rule, to render such error prejudicial it must be made to appear that the witness would have testified to a material fact.³⁷ In some cases, the court has refused to reverse the trial court's judgment, observing that the proposed testimony was of little or no materiality and would not have produced a different result,³⁸ sometimes pointing out that the excluded testimony was merely cumulative.³⁹ As a rule, the courts have taken the view that in the absence of a showing as to the nature or content of

Annotations: 14 ALR3d 16 § 16[a].

36. *United States v Berdick* (CA5 Fla) 555 F2d 1329, cert den 434 US 1010, 54 L Ed 2d 753, 98 S Ct 721; *United States v Vario* (CA2 NY) 484 F2d 1052, 73-2 USTC ¶9737, 32 AFTR 2d 72-5867, cert den 414 US 1129, 38 L Ed 2d 753, 94 S Ct 867; *Lewis v State*, 44 Ala App 319, 208 So 2d 228; *State v Sowards*, 99 Ariz 22, 406 P2d 202; *Jordan v People*, 151 Colo 133, 376 P2d 699, cert den 373 US 944, 10 L Ed 2d 699, 83 S Ct 1553; *Matthews v United States* (Dist Col App) 267 A2d 826, cert den 404 US 884, 30 L Ed 2d 166, 92 S Ct 221; *Pearley v State*, 235 Ga 276, 219 SE2d 404; *Laney v State*, 159 Ga App 609, 284 SE2d 114; *Bryan v State*, 148 Ga App 428, 251 SE2d 338; *Baker v State*, 143 Ga App 302, 238 SE2d 241; *Still v State*, 142 Ga App 312, 235 SE2d 737; *People v Horne* (1st Dist) 110 Ill App 2d 167, 249 NE2d 282; *O'Conner v State*, 272 Ind 460, 399 NE2d 364; *Rinard v State*, 265 Ind 56, 351 NE2d 20; *Bartruff v State* (Ind App) 528 NE2d 110; *Toth v State*, 176 Ind App 283, 375 NE2d 256; *Sleck v State*, 175 Ind App 22, 369 NE2d 963; *State v Don* (Iowa) 318 NW2d 801, post-conviction proceeding (Iowa App) 404 NW2d 591, habeas corpus proceeding (CA8 Iowa) 886 F2d 203, reh den, motion den (CA8) 1989 US App LEXIS 16019; *State v Edwards*, 209 Kan 696, 498 P2d 53; *State v Lewis* (La) 367 So 2d 1155 (ovrld on other grounds by *State v Holden* (La) 375 So 2d 1372); *State v Lawrence* (La) 365 So 2d 1356, cert den 444 US 846, 62 L Ed 2d 60, 100 S Ct 93, post-conviction proceeding (La) 571 So 2d 133; *People v Boles*, 127 Mich App 759, 339 NW2d 249, revd on other grounds 420 Mich 851, 358 NW2d 894; *People v Fields*, 49 Mich App 652, 212 NW2d 612; *State v Bynum* (Mo App) 508 SW2d 216; *State v Ortiz* (App) 88 NM 370, 540 P2d 850; *Wald v State* (Okla Crim) 513 P2d 330; *Re Estate of Lambe* (Okla App) 710 P2d 772; *Nance v State*, 210 Tenn 328, 358 SW2d 327; *Bryant v State* (Tenn Crim) 503 SW2d 955.

Annotations: 14 ALR3d 16 § 17.

37. *Taylor v United States* (CA9 Wash) 388 F2d 786; *Williams v State*, 258 Ark 207, 523 SW2d 377 (diverged from by *Hendrickson v State*, 290 Ark 319, 719 SW2d 420); *Mobley v State*, 251 Ark 448, 473 SW2d 176; *Atkinson v State* (Fla App D4) 317 So 2d 807, cert den (Fla) 330 So 2d 21; *Wright v State*, 246 Ga 53, 268 SE2d 645; *Jacobs v Commonwealth* (Ky) 551 SW2d 223; *Keating v Jerde* (Mo App) 472 SW2d 651.

Annotations: Effect of witness' violation of order of exclusion, 14 ALR3d 16 § 19[b].

38. *Robinson v Tennessee* (ED Tenn) 340 F Supp 82, affd (CA6 Tenn) 474 F2d 1273, cert den 414 US 848, 38 L Ed 2d 96, 94 S Ct 137; *Jett v Jett* (Dist Col App) 221 A2d 925; *Blanchard v State*, 247 Ga 415, 276 SE2d 593; *Jordan v State*, 247 Ga 328, 276 SE2d 224, habeas corpus proceeding (CA11 Ga) 763 F2d 1265; *People v Bodeman* (1st Dist) 105 Ill App 3d 39, 60 Ill Dec 902, 433 NE2d 1140; *State v Warren* (La) 437 So 2d 836; *State v Boutte* (La) 384 So 2d 773 (ovrld on other grounds by *State v Roy* (La) 395 So 2d 664); *State v Trahan* (La App 3d Cir) 543 So 2d 984 (disapproved on other grounds by *State v Simpson* (La) 551 So 2d 1303, later app (La) 565 So 2d 427, reh den (La) 566 So 2d 993 and reh den (La) 1990 La LEXIS 1845) and cert gr (La) 556 So 2d 1252 and affd (La) 576 So 2d 1; *State v Cremeans* (App, Franklin Co) 46 Ohio L Abs 573, 70 NE2d 676.

Annotations: 14 ALR3d 16 § 19[a].

39. *United States v Atkins* (CA8 Mo) 487 F2d 257; *State v Barnard* (La) 287 So 2d 770; *State v Joubert* (La App 3d Cir) 534 So 2d 91; *State v Jones* (La App 1st Cir) 496 So 2d 638; *Swift v State*, 224 Md 300, 167 A2d 762; *Goss v State* (Miss) 413 So 2d 1033; *Ford v State* (Miss) 227 So 2d 454; *State v Neria* (Mo App) 526 SW2d 396; *People v Lloyd* (2d Dept) 106 App Div 2d 405, 482 NYS2d 326; *Cassady v State* (Okla Crim) 483 P2d 1169; *State v Weeden* (Tenn Crim) 733 SW2d 124.

Annotations: 14 ALR3d 16 § 20.

such testimony, it must be presumed that the trial court acted properly and within its discretion in excluding it.⁴⁰

In the case of an erroneous admission of testimony, as distinguished from the erroneous exclusion, the courts agree that a trial court's admission of testimony of a witness who violated a sequestration order will not be held reversible error if the party who has allegedly been wronged by such admission fails to show that he was in any way prejudiced by the testimony.⁴¹

§ 250. Violation as contempt of court

A witness who violates the rules of exclusion might be subject to attachment for contempt where the violation is intentional,⁴² as may the party or counsel calling the witness, if he aided or abetted the violation.⁴³

40. *Morasso v State*, 74 Fla 269, 76 So 777.

Annotations: 14 ALR3d 16 § 21[b].

41. *United States v Vario* (CA2 NY) 484 F2d 1052, 73-2 USTC ¶9737, 32 AFTR 2d 72-5867, cert den 414 US 1129, 38 L Ed 2d 753, 94 S Ct 867; *United States v Phifer* (ED Pa) 400 F Supp 719, affd without op (CA3 Pa) 532 F2d 747 and affd without op (CA3 Pa) 532 F2d 748; *United States v Sanders* (ED Pa) 322 F Supp 947, affd (CA3 Pa) 459 F2d 86, cert den 409 US 860, 34 L Ed 2d 106, 93 S Ct 146; *Partridge v State* (Ala App) 431 So 2d 1377; *Pope v State* (Ala App) 367 So 2d 998; *Goldsmith v State* (Ala App) 344 So 2d 793, cert den (Ala) 344 So 2d 799; *Page v State*, 57 Ala App 265, 327 So 2d 760; *State v Stolze*, 112 Ariz 124, 539 P2d 881; *State v Romero*, 85 Ariz 263, 336 P2d 366; *Cooley v State*, 4 Ark App 238, 629 SW2d 311, habeas corpus proceeding (CA8 Ark) 839 F2d 431; *People v Wright* (Colo App) 678 P2d 1072; *Fountain v State* (Del Sup) 382 A2d 230; *Derrickson v State* (Del Sup) 321 A2d 497; *Zamora v State* (Fla App D3) 361 So 2d 776, cert den (Fla) 372 So 2d 472, post-conviction proceeding (Fla App D3) 422 So 2d 325, habeas corpus proceeding (SD Fla) 610 F Supp 159, habeas corpus proceeding (SD Fla) 637 F Supp 439, affd (CA11 Fla) 834 F2d 956; *People v Bauman* (1st Dist) 34 Ill App 3d 582, 340 NE2d 178; *People v Kozlowski* (1st Dist) 95 Ill App 2d 464, 238 NE2d 156; *People v Russell*, 17 Ill 2d 328, 161 NE2d 309; *Halbig v State* (Ind) 525 NE2d 288; *Wireman v State* (Ind) 432 NE2d 1343, cert den 459 US 992, 74 L Ed 2d 389, 103 S Ct 350; *Shindler v State*, 166 Ind App 258, 335 NE2d 638; *State v Ardoin* (La) 340 So 2d 1362; *Henderson v Eastman Whipstock Pilot, Inc.* (La App 3d Cir) 524 So 2d 850, cert den (La) 525 So 2d 1049; *State v Davis* (La App 2d Cir) 430 So 2d 680, cert den (La) 433 So 2d 1056; *People v Gonyea*, 126 Mich App 177, 337 NW2d 325, revd on other grounds 421 Mich 462, 365 NW2d 136; *State v Radi*, 176 Mont 451, 578 P2d 1169, later app 185 Mont 38, 604 P2d 318; *State v De Groot*, 230

Neb 101, 430 NW2d 290; *Commonwealth v Floyd*, 259 Pa Super 552, 393 A2d 963; *Motherhead v State* (Tenn Crim) 578 SW2d 96; *Triton Oil & Gas Corp. v E.W. Moran Drilling Co.* (Tex Civ App Fort Worth) 509 SW2d 678, 48 OGR 207, writ ref n re (disagreed with on other grounds by Elbar, Inc. v Claussen (Tex App Dallas) 774 SW2d 45, writ diss (Feb 7, 1990)); *White v State*, 165 Tex Crim 612, 309 SW2d 468; *State v Velasquez* (Utah) 672 P2d 1254; *State v Steele* (W Va) 359 SE2d 558; *State v Bembenek* (App) 111 Wis 2d 617, 331 NW2d 616, post-conviction proceeding (App) 140 Wis 2d 248, 409 NW2d 432, post-conviction proceeding (Wis App) 1990 Wisc App LEXIS 593.

Annotations: 14 ALR3d 16 § 22.

42. *Holder v United States*, 150 US 91, 37 L Ed 1010, 14 S Ct 10; *State v Schlaefli*, 117 Ariz 1, 570 P2d 772 (ovrld on other grounds by *State v Roberts*, 126 Ariz 92, 612 P2d 1055); *Cooley v State*, 4 Ark App 238, 629 SW2d 311, habeas corpus proceeding (CA8 Ark) 839 F2d 431; *People v Young* (3rd Dist) 175 Cal App 3d 537, 221 Cal Rptr 32; *Hayes v State*, 175 Ga App 135, 332 SE2d 917; *Strozier v State*, 145 Ga App 566, 244 SE2d 89; *Pless v State*, 142 Ga App 594, 236 SE2d 842; *State v Franks* (La App 3d Cir) 483 So 2d 224, cert den (La) 488 So 2d 196.

A witness cannot be held in contempt of court where his violation of the sequestration order was merely inadvertent and not wilful. *Lee v Thornton*, 174 NC 288, 93 SE 788.

Generally, as to violation of particular court orders as contempt, see 17 Am Jur 2d, Contempt §§ 130 et seq.

Annotations: Effect of witness' violation of order of exclusion, 14 ALR3d 16 § 24.

43. *Holder v United States*, 150 US 91, 37 L Ed 1010, 14 S Ct 10; *Cooley v State*, 4 Ark App 238, 629 SW2d 311, habeas corpus proceeding (CA8 Ark) 839 F2d 431.

Annotations: 14 ALR3d 16 § 25.

§ 251. Other effects of violation

Numerous cases have held or recognized that where a witness disobeys an order excluding witnesses, the fact of disobedience may go to the jury as bearing on his credibility.⁴⁴

Generally, a mere violation of a sequestration order does not compel the trial court to declare a mistrial⁴⁵ or to grant a motion to set aside the verdict.⁴⁶

Mere violation of a rule of sequestration does not result in automatic reversal.⁴⁷

Although it has been held that an alleged violation of a sequestration order would not suggest the need for the withdrawal of a juror,⁴⁸ it has also been said that, upon ascertainment of the plaintiff's disregard of a sequestration order, the case should have been withdrawn from the jury and a postponement allowed.⁴⁹

8. CONTROL OVER CONDUCT OF PERSONS PRESENT [§§ 252-257]

§ 252. Generally

The court has both the statutory and inherent power and duty to preserve the order of the court and to see to it that all persons indulge in no act or

44. *Holder v United States*, 150 US 91, 37 L Ed 1010, 14 S Ct 10; *United States v Jimenez* (CA11 Fla) 780 F2d 975, 19 Fed Rules Evid Serv 1674; *United States v Walker* (CA5 La) 613 F2d 1349, 5 Fed Rules Evid Serv 983, cert den 446 US 944, 64 L Ed 2d 800, 100 S Ct 2172 and cert den 446 US 955, 64 L Ed 2d 813, 100 S Ct 2925; *Schroff v State* (Alaska App) 627 P2d 653; *State v Schlaefli*, 117 Ariz 1, 570 P2d 772 (ovrld on other grounds by *State v Roberts*, 126 Ariz 92, 612 P2d 1055); *Cooley v State*, 4 Ark App 238, 629 SW2d 311, habeas corpus proceeding (CA8 Ark) 839 F2d 431; *Jones v State*, 253 Ga 640, 322 SE2d 877; *Wright v State*, 246 Ga 53, 268 SE2d 645; *Fouts v State*, 240 Ga 39, 239 SE2d 366; *Baughman v State*, 173 Ga App 426, 326 SE2d 800; *Creech v State*, 171 Ga App 217, 319 SE2d 76; *Wiseman v State*, 168 Ga App 749, 310 SE2d 295; *Bright v State*, 162 Ga App 634, 292 SE2d 511; *Morgan v State*, 161 Ga App 67, 288 SE2d 836; *Stroming v State*, 152 Ga App 129, 262 SE2d 193; *Strozier v State*, 145 Ga App 566, 244 SE2d 89; *Toth v State*, 176 Ind App 283, 375 NE2d 256; *State v Tillman*, 122 NJ Super 137, 299 A2d 419; *People v Lloyd* (2d Dept) 106 App Div 2d 405, 482 NYS2d 326; *Commonwealth v Scott*, 496 Pa 78, 436 A2d 161; *Commonwealth v Turner*, 389 Pa 239, 133 A2d 187; *State v Whalon*, 1 Wash App 785, 464 P2d 730, review den 78 Wash 2d 992.

Annotations: Effect of witness' violation of order of exclusion, 14 ALR3d 16 § 26.

45. *United States v Jimenez* (CA11 Fla) 780 F2d 975, 19 Fed Rules Evid Serv 1674; *United States v Littwin* (CA6 Tenn) 338 F2d 141, cert

den 380 US 911, 13 L Ed 2d 797, 85 S Ct 896; *Graham v State*, 296 Ark 400, 757 SW2d 538, post-conviction proceeding (Ark) 1990 Ark LEXIS 155; *Cooley v State*, 4 Ark App 238, 629 SW2d 311, habeas corpus proceeding (CA8 Ark) 839 F2d 431; *Gomez v People*, 155 Colo 507, 395 P2d 462; *Bridges v State*, 242 Ga 251, 248 SE2d 647; *Hood v State*, 157 Ga App 282, 277 SE2d 261; *Rakestraw v State*, 155 Ga App 563, 271 SE2d 696; *Strozier v State*, 145 Ga App 566, 244 SE2d 89; *Sleck v State*, 175 Ind App 22, 369 NE2d 963; *State v Mullins* (La) 353 So 2d 243; *State v Kendrick*, 239 Or 512, 398 P2d 471; *Commonwealth v Scott*, 496 Pa 78, 436 A2d 161; *Commonwealth v Smith*, 464 Pa 314, 346 A2d 757.

As to grounds for mistrial, generally, see § 1706.

Annotations: 14 ALR3d 16 § 27.

46. *State v Lowry*, 170 NC 730, 87 SE 62.

Annotations: 14 ALR3d 16 § 28.

47. *State v Schlaefli*, 117 Ariz 1, 570 P2d 772 (ovrld on other grounds by *State v Roberts*, 126 Ariz 92, 612 P2d 1055); *Sleck v State*, 175 Ind App 22, 369 NE2d 963.

48. *Commonwealth v Lomax*, 196 Pa Super 5, 173 A2d 710.

As to grounds for withdrawal or substitution of juror, see §§ 1701 et seq.

Annotations: 14 ALR3d 16 § 28.

49. *St. Louis & S.F.R. Co. v Akers* (Tex Civ App) 73 SW 848.

Annotations: 14 ALR3d 16 § 28.

conduct calculated to obstruct the administration of justice, and to take whatever steps are necessary to see that no conduct on the part of any person obstructs the administration of justice.⁵⁰ A large measure of discretion resides in the trial court in this respect,⁵¹ and its exercise will not be disturbed on appeal unless it appears that prejudice resulted from the denial of a legal right.⁵² A judge has the power to issue appropriate orders regulating conduct in the courtroom in order to assure an orderly trial.⁵³

One of the ideals of criminal jurisprudence is that a defendant is entitled to a trial in a calm judicial atmosphere to minimize any possibility of a decision being rendered on speculation or emotion rather than on the facts and logical reasoning. On occasion, however, the decorum of the courtroom has been disturbed by demonstrations by spectators. On such occasions, in determining whether a defendant was denied a fair trial, the decision of whether the jury was or possibly could have been influenced is one which is necessarily left to the sound discretion of the trial court, the exercise of which will not be disturbed unless it appears that prejudice resulted from the disturbance.⁵⁴

Practice guide: The trial judge, either before a criminal trial or at the beginning, should prescribe and make known the ground rules relating to conduct which the parties, the prosecutor, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the code of criminal procedure or in the published rules of court.

§ 253. Parties; criminal defendants

Many, if not most, trials by jury involve some degree of emotion by at least one party or the other. It would be unreasonable to expect that all emotions be completely frozen during a trial by jury when such effective bridle on emotions cannot be sustained elsewhere. It is the duty of the trial judge to control such emotions before a jury to the extent that he reasonably can do so.⁵⁵ If it is apparent that such emotional outburst by a party may influence the

50. *People v Jones* (1st Dist) 95 Cal App 3d 403, 157 Cal Rptr 51; *State v Peters*, 44 Hawaii 1, 352 P2d 329, 81 ALR2d 1137; *State v McNaught*, 238 Kan 567, 713 P2d 457, 12 Media L R 1890; *Calder v Levi*, 168 Md 260, 177 A 392, 97 ALR 880; *Fitzpatrick v St. Louis, S.F.R. Co. (Mo)* 327 SW2d 801, 80 ALR2d 825.

51. *State v McNaught*, 238 Kan 567, 713 P2d 457, 12 Media LR 1890; *State v Stewart*, 278 SC 296, 295 SE2d 627, 29 ALR4th 649, cert den 459 US 828, 74 L Ed 2d 65, 103 S Ct 64; *State v Spears*, 76 Wyo 82, 300 P2d 551 (disapproved on other grounds by *Gerstein v Pugh*, 420 US 103, 43 L Ed 2d 54, 95 S Ct 854, 19 FR Serv 2d 1499, on remand (CA5 Fla) 511 F2d 528, on remand (SD Fla) 422 F Supp 498 and (disagreed with by multiple cases as stated in *Viens v Daniels* (CA7 Ill) 871 F2d 1328, reh den (CA7) 1989 US App LEXIS 9017)) as stated in *Wilson v State* (Wyo) 655 P2d 1246.

52. *State v McNaught*, 238 Kan 567, 713 P2d 457, 12 Media LR 1890; *Walden v Jones*, 289

Ky 395, 158 SW2d 609, 141 ALR 105; *Calder v Levi*, 168 Md 260, 177 A 392, 97 ALR 880; *State v Hathaway (Mo)* 269 SW2d 57, 46 ALR2d 942; *State v Stewart*, 278 SC 296, 295 SE2d 627, 29 ALR4th 649, cert den 459 US 828, 74 L Ed 2d 65, 103 S Ct 64.

As to discharge of the jury because of the misconduct of spectators, see § 1738.

53. *United States v Cabra* (CA5 La) 622 F2d 182.

As to the court's power to control the conduct of the trial, generally, see § 180.

54. *State v McNaught*, 238 Kan 567, 713 P2d 457, 12 Media L R 1890.

55. *Associated Distributors, Inc. v Strozier*, 144 Ga App 205, 240 SE2d 761.

Emotional moments in the conduct of a party or the testimony of a witness are not unusual occurrences in the course of a trial, and courts have a wide latitude in coping with such instances. *Pier 66 Co. v Poulos* (Fla App D4) 542 So 2d 377, 14 FLW 796, review den (Fla) 551 So 2d 462.

jury either for or against his interest, the trial judge should give appropriate cautionary instructions to the jury.⁵⁶

The governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward.⁵⁷

Trial judges confronted with disruptive, contumacious, stubbornly defiant defendants in criminal cases must be given sufficient discretion to meet the circumstances of each case, and there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant whose disruptive conduct has made it impossible to carry on his criminal trial: bind and gag him, thereby keeping him present,⁵⁸ cite him for contempt,⁵⁹ or take him out of the courtroom until he promises to conduct himself properly.⁶⁰

Although emotional demonstrations by parties to a personal injury action such as crying should be avoided, the prejudicial effect thereof is a matter to be determined by the trial court in the exercise of its sound discretion. The matter of determining whether an emotional display engenders passion and prejudice on the part of the jury is something which also should be left largely to the discretion of the trial court. Absent a manifest abuse of that discretion, the appellate court should not interfere.⁶¹

A litigant's conduct during trial may be such as to require reversal of a judgment in his favor even where his conduct is not called to the attention of the trial court.⁶²

While a party is guilty of misconduct where, on the witness stand, he makes unfounded charges of misconduct on the part of his adversary⁶³ or a witness,⁶⁴ the possible prejudice therefrom may be eliminated by a proper admonition of the court.

§ 254. Bystanders or spectators

Demonstrations and outbursts which occur during the course of a trial are matters within the trial court's discretion unless a new trial is necessary to insure a fair trial.⁶⁵ In case of any disturbance of a trial by bystanders, the

While a trial court has power to repress or correct by adequate means a litigant who, while testifying, attempts to elicit prejudice, sympathy, or passion that would tend to prevent an impartial consideration of the case, it should not on its own initiative refuse to allow a litigant to take the witness stand because of an observed condition of extreme nervousness. *Calder v Levi*, 168 Md 260, 177 A 392, 97 ALR 880.

56. *Associated Distributors, Inc. v Strozier*, 144 Ga App 205, 240 SE2d 761.

57. *Taylor v United States*, 414 US 17, 38 L Ed 2d 174, 94 S Ct 194 (superseded by statute on other grounds as stated in *State v Comtois*, 122 NH 1173, 453 A2d 1324); *Illinois v Allen*, 397 US 337, 25 L Ed 2d 353, 90 S Ct 1057, 51 Ohio Ops 2d 163, reh den 398 US 915, 26 L Ed 2d 80, 90 S Ct 1684.

58. *Illinois v Allen*, 397 US 337, 25 L Ed 2d 353, 90 S Ct 1057, 51 Ohio Ops 2d 163, reh den 398 US 915, 26 L Ed 2d 80, 90 S Ct 1684.

As to gagging of accused as denial of fair trial, see 21A Am Jur 2d, Criminal Law § 651.

59. § 297.

60. *Illinois v Allen*, 397 US 337, 25 L Ed 2d 353, 90 S Ct 1057, 51 Ohio Ops 2d 163, reh den 398 US 915, 26 L Ed 2d 80, 90 S Ct 1684.

61. *Eichelberger v Barnes Hospital* (Mo App) 655 SW2d 699.

62. *Tom Reed Gold Mines Co. v Berd*, 32 Ariz 479, 260 P 191, 57 ALR 55.

Annotations: Manifestation of emotion by party during civil trial as ground for mistrial, reversal, or new trial, 69 ALR2d 954 § 4.

63. *Tom Reed Gold Mines Co. v Berd*, 32 Ariz 479, 260 P 191, 57 ALR 55.

64. *Dean v Temptron, Inc.*, 234 SC 532, 109 SE2d 167.

65. *Sheppard v State*, 235 Ga 89, 218 SE2d 830 (holding that where the trial judge immediately instructed the jury to disregard an out-

court may not only rebuke them, but it may also punish them by fine and imprisonment.⁶⁶ Moreover, it may exclude from the courtroom persons who are guilty of disorderly conduct or who impede the administration of the law.⁶⁷ Whether a bystander should be excluded from the courtroom on the ground that his presence will intimidate witnesses rests within the discretion of the trial court.⁶⁸

Where the misconduct was calculated to influence the jury in a criminal trial, and it appears that prejudice resulted, a new trial will be granted⁶⁹ or judgment reversed,⁷⁰ even though there is a failure to interpose objection to the misconduct, or to except to the action or lack of action of the court in respect thereto⁷¹ and the jury declares that it was not influenced.⁷² Indeed, it has been held that a judgment will be reversed because of such misconduct, even where there are grave doubts as to whether the jury was influenced.⁷³

§ 255. —Particular conduct

Judgment will be reversed where a spectator makes a direct and manifest attempt to influence the jury in its verdict,⁷⁴ it being sufficient, according to some authorities, to require a new trial or reversal, if the mind of a juror might have been influenced.⁷⁵

In most of the cases, the courts, although recognizing, at least inferentially, that it is improper for a spectator in a courtroom to coach a witness while he is testifying, have held that no prejudicial error resulted from such coaching under the particular circumstances, either because no abuse of the trial judge's discretion was shown,⁷⁶ the record failed to show that any harm resulted therefrom,⁷⁷ the objection to such misconduct was not timely or properly

burst, it was unlikely that a single outcry from a spectator prejudiced the defendant's entire defense).

66. *Smith v State*, 95 Miss 786, 49 So 945; *Aabel v State*, 86 Neb 711, 126 NW 316.

67. § 206.

68. *People v Ong Git*, 23 Cal App 148, 137 P 283.

As to closure of proceeding to prevent intimidation of witnesses, see § 206.

69. 58 Am Jur 2d, New Trial §§ 294, 295.

70. *Wamsley v State*, 171 Neb 197, 106 NW2d 22; *Commonwealth v Hoover*, 227 Pa 116, 75 A 1023.

Manifestations of grief by spectators do not alone furnish ground for reversal where proper steps to prevent a repetition are taken and it does not appear that the jury was influenced thereby, or, even in the absence of action by the judge, where no prejudice results. *State v Craft*, 85 Ariz 143, 333 P2d 728; *State v Chinn*, 229 La 984, 87 So 2d 315.

71. *White v State*, 25 Ala App 323, 146 So 85; *State v Gens*, 107 SC 448, 93 SE 139.

72. *Ullom v Griffith* (Mo App) 263 SW 876; *State v Gens*, 107 SC 448, 93 SE 139.

73. *Fitzpatrick v St. Louis, S.F.R. Co.* (Mo) 327 SW2d 801, 80 ALR2d 825.

74. *Commonwealth v Hoover*, 227 Pa 116, 75 A 1023; *State v Gens*, 107 SC 448, 93 SE 139; *Derry v State*, 55 Tex Crim 353, 116 SW 574.

75. *State v Gevrez*, 61 Ariz 296, 148 P2d 829 (ovrld on other grounds by *State v Clark*, 112 Ariz 493, 543 P2d 1122); *Glenn v State*, 205 Ga 32, 52 SE2d 319.

As to contemptuous behavior of bystanders or spectators, see 17 Am Jur 2d, Contempt § 73.

76. *State v Peters*, 44 Hawaii 1, 352 P2d 329, 81 ALR2d 1137; *Ricketts v State* (Ind) 498 NE2d 1222; *State v Hackett* (Iowa) 197 NW2d 569; *State v Anderson* (Tenn Crim) 748 SW2d 201.

Annotations: Coaching of witness by spectator at trial as prejudicial error, 81 ALR2d 1142 § 2.

77. *Duke v United States* (CA9 Cal) 255 F2d 721, cert den 357 US 920, 2 L Ed 2d 1365, 78 S Ct 1361; *Reske v Klein* (1st Dist) 33 Ill App 2d 302, 179 NE2d 415; *State v Grayson*, 225 La 142, 72 So 2d 457; *State v Johnson* (Stark Co) 38 Ohio App 3d 152, 528 NE2d 567, motion overr.

Annotations: 81 ALR2d 1142 § 3.

made,⁷⁸ or the trial judge took seasonable curative action to offset the possible prejudicial effect of the misconduct.⁷⁹ However, in a few instances the fact that the trial judge refused or failed to take curative action has been held to constitute reversible error, or at least a contributing factor, along with other errors, in requiring a reversal.⁸⁰

Where the spectators show their prejudice by hissing or other demonstrations interfering with a fair trial, the trial should not be permitted to proceed.⁸¹ While applause is not in and of itself ground for reversal where the offending persons are promptly rebuked or punished and the jury is not influenced,⁸² frequent bursts of applause by spectators may require a reversal.⁸³ A judgment will be reversed where a large crowd of people hostile to the accused fill the space within the bar immediately around the judge, the jury, and the witness, and where the crowd's presence is calculated to overawe or influence the jury or to substantially interfere with the rights of the defendant.⁸⁴ Judgment will also be reversed where, without rebuke from the court, bystanders display posters condemning the type of activities for which the accused is being tried.⁸⁵

§ 256. Representatives of the news media

If at any time representatives of the press, in any field of activity, interfere with the orderly conduct of court procedure or create distractions interfering therewith, the court has the inherent power to put an immediate stop to such conduct.⁸⁶

A court has the power not only to forbid the use of cameras in the courtroom during the trial of one accused of crime, but also to forbid the publication of photographs of a prisoner on trial.⁸⁷ Indeed, the court may

78. *Robison v State* (Alaska App) 763 P2d 1357; *People v Padley*, 363 Ill 50, 1 NE2d 209; *State v Hackett* (Iowa) 197 NW2d 569; *State v Johnson* (Stark Co) 38 Ohio App 3d 152, 528 NE2d 567, motion overr.

Annotations: 81 ALR2d 1142 § 4.

79. *State v Peters*, 44 Hawaii 1, 352 P2d 329, 81 ALR2d 1137.

Annotations: 81 ALR2d 1142 § 5.

80. *Wamsley v State*, 171 Neb 197, 106 NW2d 22.

Annotations: 81 ALR2d 1142 § 5.

81. *Commonwealth v Hoover*, 227 Pa 116, 75 A 1023.

82. *Debney v State*, 45 Neb 856, 64 NW 446.

83. *People v Fleming*, 166 Cal 357, 136 P 291.

84. *People v Fleming*, 166 Cal 357, 136 P 291; *State v Weldon*, 91 SC 29, 74 SE 43.

However, in a trial for the murder of a schoolteacher, the mere fact that the school adjourns and attends a portion of the trial by concert of action by the faculty does not require a reversal. *Long v State*, 59 Tex Crim 103, 127 SW 551.

85. *State v Gens*, 107 SC 448, 93 SE 139.

86. *Hudson v State*, 108 Ga App 192, 132 SE2d 508, 100 ALR2d 1395.

As to press access to judicial proceedings as an aspect of the right to a public trial, see §§ 212 et seq.

As to the presence of cameras in the courtroom as impacting on the right to a fair trial, see § 198.

Practice References: Regulation of conduct of members of press in courtroom. 9 Federal Procedure, L Ed, Criminal Procedure § 22:813.

87. *Sheppard v Maxwell*, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media LR 1220; *Ex parte Sturm*, 152 Md 114, 136 A 312, 51 ALR 356 (superseded by statute on other grounds as stated in *Billman v Maryland Deposit Ins. Fund Corp.*, 312 Md 128, 538 A2d 1172); *State v Langley*, 214 Or 445, 315 P2d 560.

See Canon 3A(7) of the American Bar Association Code of Judicial Conduct.

Practice References: Control over photography. 1 Am Jur Trials 303, Controlling Trial Publicity § 36.

order the surrender of a photograph negative of a prisoner on trial before it, although it was taken while the prisoner was on his way through the courthouse to the courtroom, and before the announcement of an order forbidding the taking of such photographs.⁸⁸

§ 257. Witnesses

The control over the witnesses in the trial of a case rests primarily in the sound discretion of the trial court, and an appellate court will not review the exercise thereof in the absence of an abuse.⁸⁹

During a trial and in the presence of the jury the trial court may cause the arrest and punishment of a contumacious witness,⁹⁰ provided that the court's action does not amount to the giving of an opinion on the facts.⁹¹ This is especially true where the jury is instructed to banish the incident from their minds.⁹² Generally, such matters are addressed to the sound discretion of the trial court.⁹³

On the other hand, the general rule is that the commitment of witnesses for perjury at the trial may not be ordered in the presence of the jury, although there is some authority to the effect that this matter, too, rests in the discretion of the trial judge.⁹⁴

E. VIEW BY JURY [§§ 258-271]

Research References

ALR Digest to 3d, 4th, and Federal, Criminal Law §§ 118.5, 131; Trial §§ 52.3, 52.5
Index to Annotations, Evidence; Instructions to Jury; Jury and Jury Trial; Trial
23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 91-95

7 Am Jur Trials 377, Elevator Accident Cases § 30

Bailey and Rothblatt, Successful Techniques for Criminal Trials (1985) § 30:10

Carlson, Successful Techniques for Civil Trial (1983) § 3:39

Danner & Toothman, Trial Practice Checklists (1989) § 8:150(E)

Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) § 15:27

Schweitzer, Cyclopedia of Trial Practice 2d ed Vol 1 (1970) § 230

88. *Ex parte Sturm*, 152 Md 114, 136 A 312, 51 ALR 356 (superseded by statute on other grounds as stated in *Billman v Maryland Deposit Ins. Fund Corp.*, 312 Md 128, 538 A2d 1172).

89. *Berberet v Electric Park Amusement Co.*, 319 Mo 275, 3 SW2d 1025, 61 ALR 1269.

As to exclusion of witnesses from courtroom, generally, see §§ 240 et seq.

90. *State v McBryde*, 270 NC 776, 155 SE2d 266; *Loan v State*, 69 Tex Crim 221, 153 SW 305.

As to punishing witnesses for contempt, generally, see 17 Am Jur 2d, Contempt §§ 97 et seq.

91. *Loan v State*, 69 Tex Crim 221, 153 SW 305.

92. *People v Moore*, 142 App Div 402, 127 NYS 98, affd 201 NY 570, 95 NE 1136.

93. *Turpin v Commonwealth*, 140 Ky 294, 130 SW 1086.

As to the punishment of bystanders, see § 254.

94. § 225.

1. IN GENERAL [§§ 258-264]

§ 258. Generally

The power to grant a view of the premises inheres in the trial courts.⁹⁵ Jury views are intended only to assist the trier of fact in understanding and evaluating the evidence.⁹⁶ The purpose of a view by the jury is to observe places and objects properly pointed out to them and to receive impressions therefrom, and not from comment, discussion, or argument.⁹⁷

■■■■ Observation: Typically, a view of the following may be ordered:

- The property which is the subject of litigation;
- The place where any relevant event occurred;
- Any object, demonstration, or experiment which is relevant and admissible in evidence in the case, and which cannot with reasonable convenience be viewed in the courtroom.⁹⁸

While a jury should not view premises without the permission of the court,⁹⁹ statutes often specifically authorize a view of the place at which a material fact occurred or a view of property with which the litigation is concerned,¹ or a view of the place where a crime was committed,² although some statutes and rules of court provide that a view by the jury may be ordered only by consent of all the parties,³ or that views by jury are prohibited and unauthorized.⁴

The power of the trial court to allow a view of premises does not, however, depend upon statutory authorization.⁵ Under statutes which do not specifically

95. *Massenberg v United States* (CA4 SC) 19 F2d 62; *State v Perry*, 121 NC 533, 27 SE 997.

As to the trial court's discretion in authorizing a jury view, see §§ 259, 260.

As to whether a view is part of a criminal trial, see 21A Am Jur 2d, Criminal Law §§ 695, 915.

96. *Dade County v Renedo* (Fla) 147 So 2d 313, 1 ALR3d 1391; *Wingate v State*, 188 Ga App 730, 374 SE2d 224; *Shahan v American Tel. & Tel. Co.*, 72 Ga App 749, 35 SE2d 5; *Grand T.W.R. Co. v Pursley* (Ind App) 530 NE2d 139; *State v Slorah*, 118 Me 203, 106 A 768, 4 ALR 1256; *State v Coleman*, 46 NJ 16, 214 A2d 393, 16 ALR3d 845, cert den 383 US 950, 16 L Ed 2d 212, 86 S Ct 1210.

As to inspection of articles, see § 189.

97. *Chouinard v Shaw*, 99 NH 26, 104 A2d 522, 45 ALR2d 1124.

98. *Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 15:27.

99. § 1548.

1. *Carter v Parsons*, 136 Neb 515, 286 NW 696.

As to a view of the premises in eminent domain proceeding, see 27 Am Jur 2d, Eminent Domain §§ 413-415.

Practice References: Motion for view by jury. 7 Am Jur Trials 377, Elevator Accident Cases § 30.

Forms: View by jury. 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 91-95.

2. *Noell v Commonwealth*, 135 Va 600, 115 SE 679, 30 ALR 1345 (ovrld on other grounds by *Jones v Commonwealth*, 227 Va 425, 317 SE2d 482).

A vehicle is a "place" within the meaning of a statute providing that a jury should view a "place" in which an offense is charged to have been committed, and there would be no prejudice in allowing the jury to view an identical vehicle to the one in question, where a view of the actual vehicle would have been proper under the circumstances. *Steward v State*, 75 Nev 498, 346 P2d 1083.

3. *Shular v State*, 105 Ind 289, 4 NE 870 (disapproved on other grounds by *New York, C. & S.L.R. Co. v Shriner*, 239 Ind 626, 158 NE2d 157, reh den 239 Ind 635, 159 NE2d 574).

4. *Woodrum Truck Lines v Bailey* (Tex Com App) 57 SW2d 92; *Abell v State*, 109 Tex Crim 380, 5 SW2d 139, 61 ALR 318.

5. *Carter v Parsons*, 136 Neb 515, 286 NW 696; *Barber v State Highway Com.*, 80 Wyo 340, 342 P2d 723.

As to the authority of a special judge to order a view, see 46 Am Jur 2d, Judges § 254.

make provisions therefor, it has nevertheless been held proper for the trial court during the trial of an accused, and over the accused's objection, to allow a view of places where acts similar to those named in the indictment are alleged to have occurred.⁶

The governing principle that an error must be prejudicial applies to errors in regard to the viewing of premises by a jury.⁷ Whether particular acts by parties or others during a view by the jury will constitute prejudicial misconduct depends in each instance upon the specific factors and circumstances of the individual case.⁸

§ 259. Discretion of court

A decision to order a viewing is within the discretion of the trial court.⁹ The extent of the view also rests within the sound discretion of the court.¹⁰

■■■■ Observation: Because views are unusual and inconvenient, counsel should not assume that permission for the view will be granted and other methods for describing or showing the scene at the view should be ready.¹¹

A view should not be granted unless it appears to be reasonably certain or the court is satisfied that it will be of some aid to the jury in reaching its

As to the objection to a view as prerequisite to a review on appeal, see 5 Am Jur 2d, Appeal and Error § 621.

As to a recovery of the costs of the view, see 20 Am Jur 2d, Costs § 66.

6. *State v Pigott* (Cuyahoga Co) 1 Ohio App 2d 22, 30 Ohio Ops 2d 56, 94 Ohio L Abs 335, 197 NE2d 911.

7. *Ball v Twin City Motor Bus Co.*, 225 Minn 274, 30 NW2d 523, 9 ALR2d 933; *Champlin Refining Co. v Donnell*, 173 Okla 527, 49 P2d 208, 103 ALR 157.

8. § 270.

9. *United States v Culpepper* (CA10 Kan) 834 F2d 879, 24 Fed Rules Evid Serv 213; *State v Mauro*, 159 Ariz 186, 766 P2d 59, 23 Ariz Adv Rep 3; *Trust v Arden Farms Co.*, 50 Cal 2d 217, 324 P2d 583, 81 ALR2d 332; *People v Peggese* (2nd Dist) 102 Cal App 3d 415, 162 Cal Rptr 510; *Schnabel v Waters*, 37 Colo App 498, 549 P2d 795; *Meizoso v Bajoros*, 12 Conn App 516, 531 A2d 943; *Bundy v State* (Fla) 471 So 2d 9, 10 FLW 269, cert den 479 US 894, 93 L Ed 2d 269, 107 S Ct 295; *Wingate v State*, 188 Ga App 730, 374 SE2d 224; *McKenzie v State*, 188 Ga App 571, 373 SE2d 830; *Harper v State*, 182 Ga App 760, 357 SE2d 117; *Self v State*, 182 Ga App 656, 356 SE2d 722; *Dietrich v Jones* (1st Dist) 172 Ill App 3d 201, 122 Ill Dec 191, 526 NE2d 450, app den 122 Ill 2d 572, 125 Ill Dec 215, 530 NE2d 243; *Commonwealth v Saylor*, 27 Mass App 117, 535 NE2d 607; *Hutchins v Page Contractors, Inc.* (Miss) 513 So 2d 944; *State v O'Neal* (Mo) 718 SW2d 498, cert den 480 US 926, 94 L Ed

2d 702, 107 S Ct 1388, post-conviction proceeding (Mo) 766 SW2d 91, cert den (US) 107 L Ed 2d 159, 110 S Ct 206; *McJunkin v Kaufman & Broad Home Systems, Inc.*, 229 Mont 432, 748 P2d 910, 5 UCCRS2d 1341; *Tubular Products, Inc. v Jacobson* (2d Dept) 138 App Div 2d 371, 525 NYS2d 655; *State v Davis*, 86 NC App 25, 356 SE2d 607, stay gr 319 NC 671, 357 SE2d 172; *State v Rogers*, 43 NC App 177, 258 SE2d 418, affd 299 NC 597, 264 SE2d 89; *Commonwealth v Burkholder*, 388 Pa Super 252, 565 A2d 472, app gr (Pa) 575 A2d 108; *Taylor v Baughman*, 38 Or App 179, 589 P2d 1160; *State v Brown* (RI) 549 A2d 1373; *Wittmeier v Post*, 78 SD 520, 105 NW2d 65, 97 ALR2d 853; *Elizabeth River Tunnel Dist. v Beecher*, 202 Va 452, 117 SE2d 685, 85 ALR2d 469.

It is within the trial court's discretion to permit a jury visit in a criminal trial. *People v McCurdy* (2d Dept) 86 App Div 2d 493, 450 NYS2d 507.

Forms: Order authorizing view of premises. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 94.

10. *Meizoso v Bajoros*, 12 Conn App 516, 531 A2d 943 (further holding that the trial court did not erroneously restrict the jury's inspection of the ball field where the plaintiff was injured by not permitting the jurors to feel the ground in the area where the plaintiff fell); *Chouinard v Shaw*, 99 NH 26, 104 A2d 522, 45 ALR2d 1124.

11. *Danner & Toothman*, Trial Practice Checklists (1989) § 8:150(E).

verdict¹² and it is distinctly impracticable and inefficient to present the material elements to them by photographs, diagrams, maps, measurements, and the like.¹³

There is a presumption as to the correctness of the trial judge's ruling in the absence of a demonstration to the contrary,¹⁴ and that decision will not be upset absent a clear abuse of discretion.¹⁵ Where no useful purpose would be served by the viewing, it is not an abuse of discretion to deny the request.¹⁶

§ 260. —Changed conditions

While it is within the trial court's discretion to permit a jury visit in a criminal trial, it is imperative that the potential of prejudice be avoided by the trial court's insuring that the scene has not significantly changed in any relevant respect.¹⁷ Where a material change has occurred in the area, the motion for a jury view may be properly denied.¹⁸ But even where there have been changes in the condition of the object of litigation, a jury view is still within the discretion of the court. It is not an abuse of discretion to allow the jury to view the premises where the changes are not material.¹⁹

Among the factors considered in determining the propriety of permitting a jury to view a place or thing, in an action for personal injuries or death, as affected by a change of conditions since the accident or incident occurred are, generally speaking, "remoteness," that is, the passage of time between the

12. *National Box Co. v Bradley*, 171 Miss 26, 157 So 91, 95 ALR 1500; *Noell v Commonwealth*, 135 Va 600, 115 SE 679, 30 ALR 1345 (ovrld on other grounds by *Jones v Commonwealth*, 227 Va 425, 317 SE2d 482).

13. *National Box Co. v Bradley*, 171 Miss 26, 157 So 91, 95 ALR 1500.

14. *Bundy v State (Fla)* 471 So 2d 9, 10 FLW 269, cert den 479 US 894, 93 L Ed 2d 269, 107 S Ct 295.

15. *Taylor v State*, 139 Fla 542, 190 So 691, 124 ALR 835; *Wingate v State*, 188 Ga App 730, 374 SE2d 224; *State v Davis*, 86 NC App 25, 356 SE2d 607, stay gr 319 NC 671, 357 SE2d 172; *Commonwealth v Burkholder*, 388 Pa Super 252, 565 A2d 472, app gr (Pa) 575 A2d 108; *Taylor v Baughman*, 38 Or App 179, 589 P2d 1160.

16. *Dietrich v Jones (1st Dist)* 172 Ill App 3d 201, 122 Ill Dec 191, 526 NE2d 450, app den 122 Ill 2d 572, 125 Ill Dec 215, 530 NE2d 243.

The trial court did not abuse its discretion in refusing the defendant's request that the jury, which included nine women, view the men's room in which the alleged robbery occurred, where the witnesses adequately described the restroom and used diagrams to depict its physical design as well as the relative positions of the parties. *State v Brown (RI)* 549 A2d 1373.

17. *People v McCurdy (2d Dept)* 86 App Div 2d 493, 450 NYS2d 507.

18. *Taylor v Baughman*, 38 Or App 179, 589 P2d 1160.

The trial court did not abuse its discretion in denying the defendant's request for a jury view of the field where he allegedly grew marijuana, where two months had elapsed and an exceedingly rainy autumn would have substantially changed the field's condition. *United States v Culpepper (CA10 Kan)* 834 F2d 879, 24 Fed Rules Evid Serv 213.

19. *Martin v Gulf States Utilities Co. (CA5 La)* 344 F2d 34, 9 FR Serv 2d 49a.224, Case 1; *Hop v Waters (2nd Dist)* 219 Cal App 2d 62, 32 Cal Rptr 786; *Central of G. R. Co. v Luther*, 128 Ga App 178, 196 SE2d 149; *Commonwealth v Saylor*, 27 Mass App 117, 535 NE2d 607; *McJunkin v Kaufman & Broad Home Systems, Inc.*, 229 Mont 432, 748 P2d 910, 5 UCCRS2d 1341; *Clark v Worrall*, 146 Mont 374, 406 P2d 822; *Alston v Herrick*, 76 NC App 246, 332 SE2d 720, affd 315 NC 386, 337 SE2d 851; *Lacy v Uganda Invest. Corp. (Cuyahoga Co)* 7 Ohio App 2d 237, 29 Ohio Ops 2d 177, 94 Ohio L Abs 73, 195 NE2d 586; *Sauls v Scheppler*, 57 Wash 2d 273, 356 P2d 714, 85 ALR2d 506.

Annotations: Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 ALR2d 512 § 3.

Forms: Order denying view of premises. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 95.

occurrence of the accident and the date of the trial,²⁰ and, specifically, the nature and extent of the change in conditions.²¹

The party who moves for a view has the burden of showing that no material change has taken place since the accident.²²

The possibility of, or a dispute as to, the occurrence of a change may be sufficient to justify a denial of a view.²³

§ 261. Territorial limitations

While there is authority to the effect that the right to order a view is limited to the territorial jurisdiction of the court,²⁴ under some statutes a view may be had anywhere within the state,²⁵ although the fact that the location involved is in another county may constitute grounds for the denial by the court in its discretion of a request for a view.²⁶ However, it has been held that the taking of a view in another state, if an irregularity, is not so far in excess of jurisdiction as to vitiate subsequent proceedings, and as to authorize an objection thereto for the first time on appeal.²⁷

§ 262. Time

The time when a view should be had is a matter resting largely in the discretion of the court.²⁸ A view may be allowed during the introduction of testimony on the part of the accused in a criminal case,²⁹ or at the close of the testimony and before submission of the case.³⁰ A view may be permitted even after the jury has retired, where both parties consent, or in criminal cases where the accused requests it, such consent or request being effective as a waiver of any irregularity in this respect.³¹

An initial refusal to permit a view is not error where a view is subsequently ordered.³²

20. *Ogden v Libby*, 159 Me 485, 195 A2d 414; *Miller v Anchor Casualty Co.*, 233 Minn 87, 45 NW2d 705; *Thompson v South Carolina State Highway Dept.*, 224 SC 338, 79 SE2d 160.

Annotations: Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 ALR2d 512 § 4.

21. *Johnson v William C. Ellis & Sons Iron Works, Inc.* (CA5 Miss) 604 F2d 950; *Tuck v Buller* (Okla) 311 P2d 212, 66 ALR2d 1043; *Taylor v Baughman*, 38 Or App 179, 589 P2d 1160; *Sauls v Scheppeler*, 57 Wash 2d 273, 356 P2d 714, 85 ALR2d 506.

Annotations: Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 ALR2d 512 §§ 7-9.

22. *Headington v Central Bldg. Co.*, 141 Kan 338, 41 P2d 1040; *Robison v Troy Laundry*, 105 Neb 267, 180 NW 43.

Annotations: Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 ALR2d 512 § 6.

23. *Chambers v Minneapolis, S.P. & S.S.M.R. Co.*, 37 ND 377, 163 NW 824; *Robinson Oil Corp. v Davis*, 171 Okla 557, 43 P2d 754.

Annotations: Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 ALR2d 512 § 5.

24. *Rockford, R.I. & S.L.R.R. Co. v Copping*, 66 Ill 510.

25. *Beck v Staats*, 80 Neb 482, 114 NW 633.

26. *Thompson v State*, 52 Fla 113, 41 So 899.

27. *Carpenter v Carpenter*, 78 NH 440, 101 A 628.

28. *State v Barnes*, 150 Or 375, 44 P2d 1071; *State v Rector*, 166 SC 335, 164 SE 865; *Leide v State*, 226 Wis 581, 277 NW 175.

29. *Curtis v State*, 36 Ark 284.

30. *State v Barnes*, 150 Or 375, 44 P2d 1071.

31. *State v Moon*, 20 Idaho 202, 117 P 757.

32. *Kentucky C.R. Co. v Smith*, 93 Ky 449, 20 SW 392.

witness becomes inadvertently confused, judicial intervention may be needed.¹⁷

As with examination, a trial court has unquestioned inherent power to call witnesses where the interests of justice require, but that power is subject to a limitation that it be impartially exercised.¹⁸

■■■■ *Practice guide:* It is improper for the court to interfere with counsel's prerogative to develop the evidence. Hence, the judge may not recall the defendant to the stand to interrogate him as to matters not touched upon in the original examination. A judge's prejudicial attitude may manifest itself by impatience with the manner in which counsel examines witnesses. Counsel should insist on developing testimony in a proper order and should not allow the judge to take over either the direct or the cross-examination of the client or key witnesses.¹⁹

§ 275. —Limitations on power

The trial court's discretion in questioning witnesses is not unlimited.²⁰ The limits of propriety in a judge's examination of witnesses, as well as factors establishing prejudice demanding reversal, may vary between a criminal and a civil trial, and between a jury and a non-jury trial.²¹ In criminal actions, the trial judge must avoid any invasion of the prosecutor's role and must exercise caution so that his questions will not be intimidating, argumentative, prejudicial, unfair, or partial.²²

The test for inappropriate questions and comments by the trial court is whether its conduct so departed from the required impartiality as to deny one of the parties a fair trial.²³ The test is not the number of questions that the

17. *United States v Slone* (CA6 Ky) 833 F2d 595, 24 Fed Rules Evid Serv 339; *United States v Hickman* (CA6 Ky) 592 F2d 931.

18. *McCartney v Commission on Judicial Qualifications*, 12 Cal 3d 512, 116 Cal Rptr 260, 526 P2d 268 (ovrld by *Spruance v Commission on Judicial Qualifications*, 13 Cal 3d 778, 119 Cal Rptr 841, 532 P2d 1209).

19. *Bailey and Rothblatt, Successful Techniques for Criminal Trials* (1985) § 29:4.

20. *Quercia v United States*, 289 US 466, 77 L Ed 1321, 53 S Ct 698; *United States v Lewis* (CA6 Ohio) 338 F2d 137, cert den 380 US 978, 14 L Ed 2d 272, 85 S Ct 1342; *People v Ross*, 181 Mich App 89, 449 NW2d 107, app den 433 Mich 907.

21. *Re Marriage of Piercy* (Mo App) 774 SW2d 539.

In a trial before a jury, the court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness. *State v Williams*, 43 Ohio St 2d 88, 72 Ohio Ops 2d 49, 330 NE2d 891.

22. *People v Hicks* (1st Dist) 183 Ill App 3d 636, 132 Ill Dec 193, 539 NE2d 756; *People v*

Ross, 181 Mich App 89, 449 NW2d 107, app den 433 Mich 907.

A trial court has not improperly acted as a prosecutor if its questions were asked only to clarify the evidence. *People v Enoch* (1st Dist) 189 Ill App 3d 535, 136 Ill Dec 905, 545 NE2d 429, app den 129 Ill 2d 567, 140 Ill Dec 676, 550 NE2d 561.

23. *United States v Robinson* (CA2 NY) 635 F2d 981, 7 Fed Rules Evid Serv 663, cert den 451 US 992, 68 L Ed 2d 852, 101 S Ct 2333; *United States v Eldred* (CA9 Ariz) 588 F2d 746; *Romero v State* (Alaska App) 785 P2d 904; *Sanchez v Lauffenburger* (Colo App) 784 P2d 855; *Eggert v Mosler Safe Co.* (Colo App) 730 P2d 895; *State v Hamilton*, 240 Kan 539, 731 P2d 863; *People v Pawelczak*, 125 Mich App 231, 336 NW2d 453; *People v Cooper* (2d Dept) 96 App Div 2d 866, 465 NYS2d 755; *Commonwealth v Hammer*, 508 Pa 88, 494 A2d 1054.

The assumption by the trial judge of the burden of cross-examining the accused in a criminal case with the use of sharp language in framing the questions is reversible error. *People v Cole*, 349 Mich 175, 84 NW2d 711; *Parker v State*, 132 Tenn 327, 178 SW 438.

If, by their tenor, their frequency, or by the persistence of the trial judge, the questions

trial court asks,²⁴ but whether, because of such questioning, the defendant was prejudiced.²⁵

While the court can interrogate witnesses to clarify testimony and insure that a case is tried fairly, the judge may not repeatedly interject himself into the proceedings when the attorneys are conducting their case in a competent manner.²⁶ Nor should the trial judge address a witness in an attempt to get him to change his testimony.²⁷

2. REMARKS AND COMMENTS [§§ 276–306]

a. IN GENERAL [§§ 276–290]

§ 276. Generally

A trial court is given wide discretion in conducting a trial, but the court cannot make comments or insinuations indicating its opinion on the credibility of a witness or the argument of counsel.²⁸ The judge, as the dominant figure in the courtroom, must guard against inadvertent comments or attitude of belief or disbelief, which may prejudice the jury.²⁹ In jury trials, the trial judge should be cautious and circumspect in his language and conduct before the jury.³⁰ It is a trial court's duty to maintain an impartial attitude and a status of neutrality, and keep its questions and comments to a minimum. It is the trial court's duty not to do or say anything that might leave the impression it was not according all of the parties a fair and impartial hearing.³¹

■■■■ Observation: Even when exposed to great provocation, as courts many times are, utterances that defeat the right of a party to a fair trial are not justified.³²

In the management and control of a trial, the trial judge should avoid intemperate language, both in what he says and how he says it; constant vigilance in avoiding the appearance of partiality, anger, and impatience, is required of trial judges who should be conscious at all times that the high office of a judge requires a temperament consonant with the high calling of

tend to convey the impression of judicial leaning, they constitute prejudicial error. *State v Currie*, 293 NC 523, 238 SE2d 477; *State v Hunt*, 297 NC 258, 254 SE2d 591.

24. *United States v De Fillo* (CA2 NY) 257 F2d 835, cert den 359 US 915, 3 L Ed 2d 577, 79 S Ct 591.

25. *United States v Kelly* (CA3 NJ) 329 F2d 314; *Woodring v United States* (CA8 Mo) 311 F2d 417, cert den 373 US 913, 10 L Ed 2d 414, 83 S Ct 1304.

26. *United States v Benefield* (CA11 Ala) 889 F2d 1061.

27. *Glover v United States* (CA8 Indian Terr) 147 F 426; *Jackson Yellow Cab Co. v Alexander*, 246 Miss 268, 148 So 2d 674; *Williams v Diamond Arrow Cabs, Inc.* (App, Mahoning Co) 84 Ohio L Abs 65, 169 NE2d 651.

28. *People v Enoch* (1989, 1st Dist) 189 Ill App 3d 535, 136 Ill Dec 905, 545 NE2d 429,

app den 129 Ill 2d 567, 140 Ill Dec 676, 550 NE2d 561.

29. *Mattice v Goodman* (1st Dist) 173 Ill App 3d 236, 123 Ill Dec 6, 527 NE2d 469.

30. *Travelers Ins. Co. v Ryan* (CA5 Tex) 416 F2d 362; *Butler v United States* (CA8 ND) 317 F2d 249, 6 ALR3d 582, cert den 375 US 836, 11 L Ed 2d 65, 84 S Ct 67 and cert den 375 US 838, 11 L Ed 2d 65, 84 S Ct 77; *Myers v George* (CA8 Iowa) 271 F2d 168, 83 ALR2d 1121; *Ward v Booth* (CA9 Hawaii) 197 F2d 963, 33 ALR2d 1134; *Skelton v Beall* (Fla App D3) 133 So 2d 477, 94 ALR2d 820; *Drewry v State*, 208 Ga 239, 65 SE2d 916, conformed to 84 Ga App 632, 66 SE2d 806; *Bullock v Sklar* (Mo App) 349 SW2d 381, 90 ALR2d 318; *Turrietta v Wyche*, 54 NM 5, 212 P2d 1041, 15 ALR2d 407.

31. *Vedron v State*, 163 Ind App 28, 321 NE2d 847; *Cundiff v Cline* (Mo App) 752 SW2d 409.

32. *Re Crist* (Mo App) 732 SW2d 587.

2. CONDUCT OF VIEW [§§ 265-271]

§ 265. Generally

Under some statutes governing a view by the jury, each party may select a guide to be approved by the court who is authorized to point out such features as it is desirable that the jury should see.⁵¹

The transportation of the jurors to the site to be viewed in vehicles furnished by one of the parties, without the knowledge of the opposing party, so prejudices the opposing party as to constitute reversible error.⁵²

§ 266. Persons present

A statutory provision governing who shall accompany the jury on a view implies that all others shall be excluded from the right or privilege.⁵³

The attorneys in a case should be present at a view by the jury unless they waive such rights.⁵⁴ The court reporter's presence has been held to be required as a matter of constitutional law at a jury view in a criminal case.⁵⁵

No employee of a witness for either party to an eminent domain proceeding should accompany the jury to the subject property. If it is necessary to inform the jurors regarding the dimensions of the property, a person able to impart such information may join them at the site. Both parties should in all events be notified that such an explanation will be given. Each may send a representative to the site to observe the presentation and, if requested by either party, the court reporter shall transcribe the colloquy.⁵⁶

§ 267. —Judge

The judge's presence at a jury view has no impact upon a defendant's fundamental constitutional right to a trial by an impartial jury.⁵⁷ Absent statutory or constitutional provisions, the trial judge is generally not required to be present at a view⁵⁸ except in equity cases where the verdict of the jury is advisory merely,⁵⁹ at least where it is the rule that the jury is not receiving evidence when viewing premises.⁶⁰ The rule is otherwise where a view is regarded as part of the trial.⁶¹

In some jurisdictions, the duty of the judge to attend the view is expressly

51. *Beals v Cone*, 27 Colo 473, 62 P 948, error dismd 188 US 184, 47 L Ed 435, 23 S Ct 275; *Keeney v Commonwealth*, Dept. of Highways (Ky) 345 SW2d 481.

52. *Shahan v American Tel. & Tel. Co.*, 72 Ga App 749, 35 SE2d 5.

53. *Shular v State*, 105 Ind 289, 4 NE 870 (disapproved on other grounds by *New York, C. & S. L. R. Co. v Shriner*, 239 Ind 626, 158 NE2d 157, reh den 239 Ind 635, 159 NE2d 574).

54. *Shahan v American Tel. & Tel. Co.*, 72 Ga App 749, 35 SE2d 5.

55. *State v Garden*, 267 Minn 97, 125 NW2d 591.

56. *Board of County Road Comrs. v GLS LeasCo, Inc.*, 394 Mich 126, 229 NW2d 797.

57. *State v Singletary* (Fla) 549 So 2d 996, 14 FLW 413.

58. *Snyder v Massachusetts* (1934) 291 US 97, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (ovrld on other grounds by *Malloy v Hogan*, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489) and (ovrld on other grounds by *Duncan v Louisiana*, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444, 45 Ohio Ops 2d 198, reh den 392 US 947, 20 L Ed 2d 1412, 88 S Ct 2270); *Shahan v American Tel. & Tel. Co.*, 72 Ga App 749, 35 SE2d 5; *State v Slorah*, 118 Me 203, 106 A 768, 4 ALR 1256.

59. *Shahan v American Tel. & Tel. Co.*, 72 Ga App 749, 35 SE2d 5.

60. *Shahan v American Tel. & Tel. Co.*, 72 Ga App 749, 35 SE2d 5.

61. *Shahan v American Tel. & Tel. Co.*, 72 Ga App 749, 35 SE2d 5.

imposed by statute.⁶² A statute requiring the judge's presence has been construed as mandatory, notwithstanding that the view is not regarded as constituting a part of the trial.⁶³

Where it is the duty of the trial judge to be present at the view, his absence has been held in some cases to constitute prejudicial error requiring the granting of a new trial or the reversal of a conviction,⁶⁴ where the requirements with respect to a timely objection and exception have been complied with.⁶⁵

Where the judge is under no legal obligation to attend the view, prejudicial error cannot, of course, be predicated upon his absence, of itself.⁶⁶

In some cases it has been held or stated, without any holding or discussion as to the judge's duty in the premises, that his failure to attend the view was not a ground of complaint, or was not prejudicial, or did not constitute prejudicial error.⁶⁷

It has been held that error arising from the judge's failure to attend a view may be corrected by an instruction to the jury to disregard any impressions received thereat and by ordering a second view which is attended by the judge.⁶⁸

Ordinarily, to entitle the defendant to a new trial or the reversal of a conviction on the ground of the judge's absence at a view by the jury, there must be a timely objection on that ground⁶⁹ and an exception to an adverse ruling thereon.⁷⁰

An objection on the ground of the judge's absence at the view will be deemed to have been waived by the failure to interpose it prior to the rendition of the verdict.⁷¹ However, a contrary conclusion has been reached as to the effect of a failure to object, under a statute construed as mandatory in respect of the judge's presence at the view.⁷²

§ 268. Supervision and conduct of jury

When the court orders a view of the premises by the jury, they should be sent in a body, attended by an officer.⁷³ Unless a statute so requires, no

62. *McCollum v State* (Fla) 74 So 2d 74, 47 ALR2d 1218; *State v Rohrich* (ND) 135 NW2d 175.

Annotations: Necessity for presence of judge at view by jury in criminal case, 47 ALR2d 1227 §§ 1, 3[d].

63. *McCollum v State* (Fla) 74 So 2d 74, 47 ALR2d 1218.

64. *McCollum v State* (Fla) 74 So 2d 74, 47 ALR2d 1218.

Annotations: Necessity for presence of judge at view by jury in criminal case, 47 ALR2d 1227 §§ 2[a], 3[d].

65. *State v Hartley*, 22 Nev 342, 40 P 372.

Annotations: 47 ALR2d 1227 §§ 2[a], 3[j].

66. *Schonfeld v United States* (CA2 NY) 277 F 934, cert den 258 US 623, 66 L Ed 796, 42 S Ct 317.

Annotations: 47 ALR2d 1227 §§ 2[a], 3[a].

67. *State v Moon*, 20 Idaho 202, 117 P 757; *State v Hartley*, 22 Nev 342, 40 P 372.

Annotations: 47 ALR2d 1227 §§ 2[a], 3[e, j].

68. *People v White*, 5 Cal App 329, 90 P 471.

69. *State v Hartley*, 22 Nev 342, 40 P 372.

Annotations: 47 ALR2d 1227 §§ 2[b], 3[j].

70. *State v Moore*, 119 La 564, 44 So 299.

71. *State v Moon*, 20 Idaho 202, 117 P 757; *State v Hartley*, 22 Nev 342, 40 P 372.

Annotations: 47 ALR2d 1227 §§ 2[b], 3[e, j].

72. *McCollum v State* (Fla) 74 So 2d 74, 47 ALR2d 1218.

Annotations: 47 ALR2d 1227 §§ 2[b], 3[d].

73. *Belcher v Commonwealth*, 247 Ky 831, 57 SW2d 988 (holding that, where the jury in a murder case was transported to the scene of the crime in two automobiles, but it did not

additional oath need be administered to such officer.⁷⁴ While the jury should be kept in a body, it is sufficient, even in criminal cases, that they be kept in a body as much as the nature of the premises permits.⁷⁵

Although such conduct has sometimes been held nonprejudicial⁷⁶ or cured by instructions of the court,⁷⁷ a juror is generally guilty of misconduct if he interrogates a bystander as to any fact relating to the case.⁷⁸

While the practice is not approved, it is not necessarily prejudicial error for the jury to make measurements on the premises where the purpose thereof is merely to locate fixed monuments referred to in the evidence, as to which there is no dispute, or to take with them photographs and ascertain the points from which they were taken.⁷⁹

■■■■ *Observation:* A new trial may be granted when a juror is directed by the court to take a view and fails to do so. The juror's failure casts enough suspicion on the administration of justice as to justify a new trial.⁸⁰

§ 269. —Experiments

Just as it is improper for them to do so at other times,⁸¹ the jury may not make experiments, demonstrations, or tests during an authorized view.⁸² Where the test, experiment, or demonstration relates to matters not in dispute or which are immaterial, however, the conduct of the jury, although susceptible of criticism, is to be considered not prejudicial.⁸³

A party will be deemed to have waived objection to misconduct of this kind by failing to raise proper objection or to otherwise bring the matter to the attention of the court at the trial when he or his counsel has knowledge of such misconduct and the opportunity to raise objection thereto.⁸⁴

§ 270. Conduct of nonjurors

No witnesses are heard, and there can be no comment or discussion during a jury view.⁸⁵ An accused present at a view may neither ask nor answer

appear that the automobiles were out of sight of each other, nor that any person conversed with any juror, or attempted to do so, or even had the opportunity to do so, denial of a new trial on this ground was not error).

74. *Emporia v Juengling*, 78 Kan 595, 96 P 850.

75. *State v Gunter*, 123 W Va 569, 17 SE2d 46.

76. *Emporia v Juengling*, 78 Kan 595, 96 P 850.

77. *Beals v Cone*, 27 Colo 473, 62 P 948, error dismd 188 US 184, 47 L Ed 435, 23 S Ct 275.

78. *State v Perry*, 121 NC 533, 27 SE 997.

79. *Keller v Harrison*, 151 Iowa 320, 128 NW 851, supp op 151 Iowa 329, 131 NW 53.

80. *Bailey and Rothblatt, Successful Techniques for Criminal Trials* (1985) § 30:10.

81. § 1548.

82. *Chouinard v Shaw*, 99 NH 26, 104 A2d

522, 45 ALR2d 1124; *Wittmeier v Post*, 78 SD 520, 105 NW2d 65, 97 ALR2d 853; *Noell v Commonwealth*, 135 Va 600, 115 SE 679, 30 ALR 1345 (ovrld on other grounds by *Jones v Commonwealth*, 227 Va 425, 317 SE2d 482).

83. *Keller v Harrison*, 151 Iowa 320, 128 NW 851, supp op 151 Iowa 329, 131 NW 53; *Emporia v Juengling*, 78 Kan 595, 96 P 850; *Stone v Florence*, 203 SC 527, 28 SE2d 409, 150 ALR 953.

84. *Carpenter v Carpenter*, 78 NH 440, 101 A 628; *State v Ballew*, 83 SC 82, 63 SE 688, reh dismd 83 SC 87, 64 SE 1019.

85. *Snyder v Massachusetts* (1934) 291 US 97, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (ovrld on other grounds by *Malloy v Hogan*, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489) and (ovrld on other grounds by *Duncan v Louisiana*, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444, 45 Ohio Ops 2d 198, reh den 392 US 947, 20 L Ed 2d 1412, 88 S Ct 2270); *State v Slorah*, 118 Me 203, 106 A 768, 4 ALR 1256.

questions, nor may he in any way interfere with the jury.⁸⁶

As to whether particular acts by parties or others during a view will constitute prejudicial misconduct depends in each instance upon the specific factors and circumstances of the individual case.⁸⁷ For instance, the landowner in a condemnation action was prejudiced where the municipal engineer, who was an employee of the condemnor and who had testified at trial, accompanied the jury during the show of the subject property to answer questions about the property.⁸⁸ It has been held that irregularities at a view by the jury may not be inherently prejudicial.⁸⁹ The prejudicial effect of misconduct may be waived by failure of the losing side to make a timely objection,⁹⁰ or it may be cured by an instruction of the trial court.⁹¹ On the other hand, where the erroneous conduct during a view has been aggravated by a reference to it by the trial judge, a new trial has been held necessary.⁹²

In most instances where there have been acts of interference with the jury by both parties, the courts have taken the position that one offsets the other and, therefore, have permitted the jury's verdict to stand.⁹³ However, occasionally reversal has been ordered where both parties have been about equally guilty of misconduct, the court holding that a party should not be allowed to profit from his misconduct, regardless of the conduct of the other party.⁹⁴

§ 271. Checklist: Considerations in preparing for or objecting to view

The following are matters to be considered in preparing for or objecting to a jury view:

- Consult any applicable rules or statutes;

However, even where the trial judge, at a view by the jury of the site of an alleged negligent homicide, asked numerous questions of the prosecution witnesses, the conviction would be permitted to stand where the record clearly showed that the defendant was not prejudiced thereby. *State v Delaney*, 15 Utah 2d 338, 393 P2d 379.

As to the adjournment of court to, and the examination of witnesses upon, a view of the premises, see 20 Am Jur 2d, Courts § 40.

86. *Snyder v Massachusetts* (1934) 291 US 97, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (ovrld on other grounds by *Malloy v Hogan*, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489) and (ovrld on other grounds by *Duncan v Louisiana*, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444, 45 Ohio Ops 2d 198, reh den 392 US 947, 20 L Ed 2d 1412, 88 S Ct 2270); *State v Miller*, 61 Wash 125, 111 P 1053.

87. *Chouinard v Shaw*, 99 NH 26, 104 A2d 522, 45 ALR2d 1124 (acts held not prejudicial); *Baroody v Anderson*, 195 SC 422, 11 SE2d 860 (acts held prejudicial).

Annotations: Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case, 45 ALR2d 1128 §§ 3, 4.

88. *Board of County Road Comrs. v GLS LeasCo, Inc.*, 394 Mich 126, 229 NW2d 797.

89. *Chouinard v Shaw*, 99 NH 26, 104 A2d 522, 45 ALR2d 1124.

90. *Shepherdson v Clopine*, 83 Neb 764, 120 NW 420; *Stevens v Nuremburg*, 117 Vt 525, 97 A2d 250.

Annotations: Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case, 45 ALR2d 1128 § 2[a].

91. *Beals v Cone*, 27 Colo 473, 62 P 948, error dismd 188 US 184, 47 L Ed 435, 23 S Ct 275; *Chouinard v Shaw*, 99 NH 26, 104 A2d 522, 45 ALR2d 1124; *Stevens v Nuremburg*, 117 Vt 525, 97 A2d 250.

Annotations: 45 ALR2d 1128 § 2[b].

92. *Martin v Tipton (Ky)* 261 SW2d 809.

Annotations: 45 ALR2d 1128 § 2[b].

93. *Alesko v Union P. R. Co.*, 62 Idaho 235, 109 P2d 874; *Drainage Com'rs of Dist. v Knox*, 237 Ill 148, 86 NE 636; *Ferris v McNally*, 45 Mont 20, 121 P 889.

Annotations: 45 ALR2d 1128 § 2[c].

94. *Nypano R. Co. v Wadsworth Salt Co.* 16 Ohio CC NS 410, 41 Ohio CC 583.

Annotations: Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case, 45 ALR2d 1128 § 2[c].

- The jury should receive preliminary instructions on the purpose and procedures for the view;
- Arrangements should be made to transport the jury to the scene of the view;
- Sometimes the jury will simply be taken to the scene and expected to look at it, without comments from any attorney, witness, or the judge;
- Sometimes the attorneys or the judge will direct the jury's attention to certain points, e.g., the relevant intersection or a place in a building where relevant events took place;
- Sometimes the attorneys or a witness may provide more extensive commentary or explanations, which should be recorded like any other testimony, e.g., explaining how a piece of machinery is operated;
- If the scene has changed since the events in issue, counsel or a witness may have to explain what has changed;
- If counsel believes that something irregular has occurred during the view, an objection should be made as with any other event at trial;
- The jurors are generally instructed not to discuss matters during the view, but merely to observe;
- Arrangements should be made to avoid contact between the jurors and other persons who might be present at the view;
- The jurors should also be admonished that they cannot conduct their own ad hoc views, e.g., when traveling to or from court.⁹⁵

F. CONDUCT OF JUDGE [§§ 272-320]

Research References

ALR Digest to 3d, 4th, and Federal, Trial §§ 51, 52

Index to Annotations, Instructions to Jury; Jury and Jury Trial; Trial by Court
7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:859

23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 130, 248, 249

5 Am Jur Trials 807, Handling Perception and Distortion in Testimony § 119

Bailey and Rothblatt, Successful Techniques for Criminal Trials (1985) § 29:4

Danner & Toothman, Trial Practice Checklists (1989) § 8:250 (H).

Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) § 22:13

Schweitzer, Cyclopedia of Trial Practice 2d ed, Vol 1 (1970) § 303

1. IN GENERAL [§§ 272-275]

§ 272. Generally

The trial court has the duty to conduct the trial in a manner calculated to promote the ascertainment of truth, fairness, and economy of time.⁹⁶ In his conduct of the trial, the presiding judge must make every effort to remain fair

95. Danner & Toothman, Trial Practice Checklists (1989) § 8:150(E).

Rowe v State (Ind) 539 NE2d 474; Jaske v State (Ind) 539 NE2d 14.

As to conduct of trial, in general, see §§ 180 et seq.

96. Vanway v State (Ind) 541 NE2d 523;

and impartial,⁹⁷ and should exercise a high degree of patience and forbearance with counsel and witnesses.⁹⁸ A trial judge must exhibit neutrality in his language and in the conduct of a trial before a jury.⁹⁹

■■■■ Observation: It has been noted that the opinion of the judge, on account of his position and the respect and confidence reposed in him and in his learning and assumed impartiality, is likely to have great weight with the jury, and such fact of necessity requires impartial conduct on his part. The judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question.¹

Inasmuch as the trial judge has, or at least should have, the absolute confidence and respect of the jury, he should be extremely careful in his remarks and actions to insure that nothing he says or does might be construed by the jury as being either critical of an attorney or of the attorney's case.² A trial judge is not, however, required to remain silent and passive throughout a jury trial,³ or to sit mute and impassive, speaking only to rule on motions or

97. *Glasser v United States*, 315 US 60, 86 L Ed 680, 62 S Ct 457, reh den 315 US 827, 86 L Ed 1222, 62 S Ct 629 and reh den 315 US 827, 86 L Ed 1222, 62 S Ct 637 and (superseded by statute as stated in *United States v Martorano* (CA1 Mass) 557 F2d 1) and (superseded by statute on other grounds as stated in *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105 and (superseded by statute on other grounds as stated in *People v Montoya* (Colo) 753 P2d 729)); *Sanchez v Rowe* (CA5 Tex) 870 F2d 291; *Tom Reed Gold Mines Co. v Brady*, 55 Ariz 133, 99 P2d 97, 127 ALR 905; *Oglesby v State*, 299 Ark 403, 773 SW2d 443; *Hays v Viscome*, 122 Cal App 2d 135, 264 P2d 173, 39 ALR2d 1435; *Seaboard C.L.R. Co. v Wiesenfeld Warehouse Co.* (Fla App D1) 316 So 2d 567, cert den (Fla) 328 So 2d 846; *People v Giacomino*, 347 Ill 523, 180 NE 437, 84 ALR 1168; *Hawkins v Compo* (Mo App) 781 SW2d 128; *State v Peters*, 82 RI 292, 107 A2d 428, 48 ALR2d 999.

It is essential to a fair trial that the presiding judge endeavor at all times to maintain an attitude of fairness and impartiality. *State v Pokini*, 57 Hawaii 17, 548 P2d 1397.

A trial judge occupies an exalted and dignified position and absolute impartiality in the conduct of the trial is expected of him. *Commonwealth v England*, 474 Pa 1, 375 A2d 1292.

Practice References: Effect of trial environment—Role and conduct of judge. 5 Am Jur Trials 807, Handling Perception and Distortion in Testimony § 119.

98. *Hawkins v Compo* (Mo App) 781 SW2d 128.

99. *United States v Candelaria-Gonzalez* (CA5

Tex) 547 F2d 291; *State v Larmond* (Iowa) 244 NW2d 233.

In a criminal case, it is not the province of the judge to convey by word or deed his opinions relative to determinations of fact, credibility of witnesses, and weight to be afforded their testimony. *People v Mays* (5th Dist) 188 Ill App 3d 974, 136 Ill Dec 489, 544 NE2d 1264.

1. *United States v Candelaria-Gonzalez* (CA5 Tex) 547 F2d 291.

2. *Seaboard C.L.R. Co. v Wiesenfeld Warehouse Co.* (Fla App D1) 316 So 2d 567, cert den (Fla) 328 So 2d 846.

The trial court should scrupulously refrain from injecting the tremendous weight of its office to influence the jury one way or the other. *Parker v State* (Ala App) 549 So 2d 989, later app (Ala App) 1990 Ala Crim App LEXIS 1681, op withdrawn, substituted op (Ala App) 1990 Ala Crim App LEXIS 2091, reh den, without op (Ala App) 1991 Ala Crim App LEXIS 125.

Because jurors are generally watchful of the conduct of the trial judge, the judge must exercise a high degree of care to avoid influencing the jury. *People v Velasco* (1st Dist) 184 Ill App 3d 618, 132 Ill Dec 781, 540 NE2d 521, app den (Ill) 136 Ill Dec 603, 545 NE2d 127.

Jurors are particularly sensitive to a judge's views, and the revelation of his feelings toward the parties, counsel, and witnesses might influence the jury more than the evidence. *State v Larmond* (Iowa) 244 NW2d 233.

As to disqualification of a judge, see 46 Am Jur 2d, Judges §§ 86 et seq.

3. *United States v Candelaria-Gonzalez* (CA5 Tex) 547 F2d 291.

objections.⁴ To the contrary, he has a duty to participate directly in the trial and to facilitate its orderly progress and clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries, and to discourage dilatory tactics of counsel. In performing this duty, he must make every effort to preserve the appearance of strict impartiality.⁵ The presiding judge should conduct a trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties. He must see that the issues are not obscured and that the testimony is not misunderstood.⁶

§ 273. Advising parties

The trial judge should not engage in conduct which amounts to acting as counsel for one of the parties.⁷

§ 274. Examination of witnesses

The duty of a judge to maintain impartiality does not bar a court from propounding questions to witnesses within the limits of propriety,⁸ regardless of which party has produced them.⁹ A trial court may direct questions to a witness to aid in the factfinding process so long as such questioning is done in an impartial manner and the defendant is not prejudiced.¹⁰ The trial judge may ask any question which would be proper for the prosecutor or defense counsel to ask so long as he does not depart from a standard of fairness and impartiality.¹¹

Practice guide: If a situation develops in which the court examines a plaintiff's witness, defense counsel should take advantage of the added weight of such examination to the fullest extent possible. Thus, if the court obtains an answer from the witness that is favorable to the defendant, the matter should not be dropped at that point. Since the court normally will not interrogate the witness concerning matters already developed on cross-examination, it can be assumed that a new point, or additional information about a previous point, will be raised by the question. If the answers given in response to the court's questioning are

4. *Sanchez v Rowe* (CA5 Tex) 870 F2d 291.

5. *United States v Candelaria-Gonzalez* (CA5 Tex) 547 F2d 291.

A trial judge is more than an umpire. He has a duty to see that the trial is conducted fairly for both sides and to eliminate error if he can, including that engendered by the inadvertence of counsel for the state or the defendant. *State v Silhan*, 302 NC 223, 275 SE2d 450.

6. *United States v Slone* (CA6 Ky) 833 F2d 595, 24 Fed Rules Evid Serv 339.

7. *Figueroa Ruiz v Delgado* (CA1 Puerto Rico) 359 F2d 718; *People v Trefonas*, 9 Ill 2d 92, 136 NE2d 817.

The trial court's giving to the defendant in a criminal case specific but uninformed advice as to the conduct of his defense, which advice the defendant followed to his disadvantage, constituted reversible error. *Richards v United States* (CA9 Nev) 318 F2d 639.

8. *United States v Slone* (CA6 Ky) 833 F2d 595, 24 Fed Rules Evid Serv 339; *Re Marriage of Piercy* (Mo App) 774 SW2d 539.

Annotations: Manner or extent of trial judge's examination of witnesses in civil cases, 6 ALR4th 951.

9. *Eggert v Mosler Safe Co.* (Colo App) 730 P2d 895; *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 436 NW2d 70, app den 434 Mich 862, reconsideration den (Mich) 1990 Mich LEXIS 962, and reconsideration den (Mich) 1990 Mich LEXIS 963; *State v Currie*, 293 NC 523, 238 SE2d 477.

10. *Sanchez v Lauffenburger* (Colo App) 784 P2d 855; *Chemco Transport, Inc. v Conn* (Ind App) 506 NE2d 1111, transf (Ind) 527 NE2d 179.

11. *Johnston v Birmingham* (Ala App) 338 So 2d 7.

helpful, defense counsel should follow up and emphasize those answers in his subsequent cross-examination. Perhaps the better way to gain the greatest possible advantage therefrom is to preface further cross-examination questions to the witness with phrasing somewhat similar to, "Now, as you have just told Judge Doe . . ." or, "As I understand your answer to Judge Doe's question . . .," as such questioning puts a further stamp of approval on the court's questioning and the favorable answers thereto.¹²

The court has some discretion in examining witnesses to clarify their testimony,¹³ or to elicit additional relevant information.¹⁴ It is sometimes the court's duty to question witnesses to develop the truth more fully and to clarify testimony.¹⁵ Questions designed to clarify points and to elicit additional relevant evidence, particularly in a non-jury trial, are not improper.¹⁶

■■■ Observation: The following three factors should be considered in determining whether a trial judge has good reason to interject himself into the trial: (1) In a lengthy, complex trial, judicial intervention is often necessary for clarification; (2) if the attorneys in a case are unprepared or obstreperous or if the facts are becoming muddled and neither side is succeeding at attempts to clear them up, judicial intervention may be necessary for clarification; (3) if a witness is difficult, if a witness's testimony is unbelievable and counsel fails to adequately probe, or if the

12. 6 Am Jur Trials 201, Cross-Examination of Plaintiff and Plaintiff's Witnesses § 27.

13. *Whitlock v Smith*, 297 Ark 399, 762 SW2d 782; *McCartney v Commission on Judicial Qualifications*, 12 Cal 3d 512, 116 Cal Rptr 260, 526 P2d 268 (ovrld on other grounds by *Spruance v Commission on Judicial Qualifications*, 13 Cal 3d 778, 119 Cal Rptr 841, 532 P2d 1209); *People v Enoch* (1st Dist) 189 Ill App 3d 535, 136 Ill Dec 905, 545 NE2d 429, app den 129 Ill 2d 567, 140 Ill Dec 676, 550 NE2d 561; *Rowe v State* (Ind) 539 NE2d 474; *People v Ross*, 181 Mich App 89, 449 NW2d 107, app den 433 Mich 907; *State v Hunt*, 297 NC 258, 254 SE2d 591; *State v Currie*, 293 NC 523, 238 SE2d 477; *State v Aleem*, 49 NC App 359, 271 SE2d 575; *Fleck v Durawood, Inc.*, 365 Pa Super 123, 529 A2d 3.

If a witness has a language difficulty, a trial judge may intervene to clarify unclear or confusing answers. However, such prerogative must not be interpreted and utilized as a license to systematically and continuously preempt and displace the prosecutor in the examination of the witness. *People v Buckheit* (2d Dept) 95 App Div 2d 814, 463 NYS2d 536.

14. *Glasser v United States*, 315 US 60, 86 L Ed 680, 62 S Ct 457, reh den 315 US 827, 86 L Ed 1222, 62 S Ct 629 and reh den 315 US 827, 86 L Ed 1222, 62 S Ct 637; *Knapp v Kinsey* (CA6 Mich) 232 F2d 458, cert den 352 US 892, 1 L Ed 2d 86, 77 S Ct 131 and reh den (CA6 Mich) 235 F2d 129; *McCartney v Commission on Judicial Qualifications*, 12 Cal 3d 512, 116 Cal Rptr 260, 526 P2d 268 (ovrld

on other grounds by *Spruance v Commission on Judicial Qualifications*, 13 Cal 3d 778, 119 Cal Rptr 841, 532 P2d 1209); *People v Rigney*, 55 Cal 2d 236, 10 Cal Rptr 625, 359 P2d 23, 98 ALR2d 186; *Baldwin v District of Columbia* (Mun Ct App Dist Col) 183 A2d 566, 99 ALR2d 651; *People v Smith*, 18 Ill 2d 547, 165 NE2d 333, 78 ALR2d 1354; *People v Giacomino*, 347 Ill 523, 180 NE 437, 84 ALR 1168; *People v Moore*, 306 Mich 29, 10 NW2d 296, cert den 321 US 787, 88 L Ed 1078, 64 S Ct 783, reh den 321 US 804, 88 L Ed 1090, 64 S Ct 846; *People v Schepps*, 217 Mich 406, 186 NW 508, 21 ALR 658; *People v Ross*, 181 Mich App 89, 449 NW2d 107, app den 433 Mich 907; *Chailland v Smiley* (Mo) 363 SW2d 619, 5 ALR3d 288; *Petcosky v Bowman*, 197 Va 240, 89 SE2d 4, 60 ALR2d 199.

15. *Sanchez v Lauffenburger* (Colo App) 784 P2d 855; *Eggert v Mosler Safe Co.* (Colo App) 730 P2d 895; *Fleck v Durawood, Inc.*, 365 Pa Super 123, 529 A2d 3.

If it appears that justice will fail because a fact has not been developed or a line of inquiry has not been pursued, the judge has a duty to intervene either by suggestions to counsel or by his own inquiry or examination of witnesses. *People v Hicks* (1st Dist) 183 Ill App 3d 636, 132 Ill Dec 193, 539 NE2d 756.

16. *Eggert v Mosler Safe Co.* (Colo App) 730 P2d 895; *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 436 NW2d 70, app den 434 Mich 862, reconsideration den (Mich) 1990 Mich LEXIS 962, and reconsideration den (Mich) 1990 Mich LEXIS 963.

witness becomes inadvertently confused, judicial intervention may be needed.¹⁷

As with examination, a trial court has unquestioned inherent power to call witnesses where the interests of justice require, but that power is subject to a limitation that it be impartially exercised.¹⁸

■■■■ *Practice guide:* It is improper for the court to interfere with counsel's prerogative to develop the evidence. Hence, the judge may not recall the defendant to the stand to interrogate him as to matters not touched upon in the original examination. A judge's prejudicial attitude may manifest itself by impatience with the manner in which counsel examines witnesses. Counsel should insist on developing testimony in a proper order and should not allow the judge to take over either the direct or the cross-examination of the client or key witnesses.¹⁹

§ 275. —Limitations on power

The trial court's discretion in questioning witnesses is not unlimited.²⁰ The limits of propriety in a judge's examination of witnesses, as well as factors establishing prejudice demanding reversal, may vary between a criminal and a civil trial, and between a jury and a non-jury trial.²¹ In criminal actions, the trial judge must avoid any invasion of the prosecutor's role and must exercise caution so that his questions will not be intimidating, argumentative, prejudicial, unfair, or partial.²²

The test for inappropriate questions and comments by the trial court is whether its conduct so departed from the required impartiality as to deny one of the parties a fair trial.²³ The test is not the number of questions that the

17. *United States v Slone* (CA6 Ky) 833 F2d 595, 24 Fed Rules Evid Serv 339; *United States v Hickman* (CA6 Ky) 592 F2d 931.

18. *McCartney v Commission on Judicial Qualifications*, 12 Cal 3d 512, 116 Cal Rptr 260, 526 P2d 268 (ovrld by *Spruance v Commission on Judicial Qualifications*, 13 Cal 3d 778, 119 Cal Rptr 841, 532 P2d 1209).

19. *Bailey and Rothblatt, Successful Techniques for Criminal Trials* (1985) § 29:4.

20. *Quercia v United States*, 289 US 466, 77 L Ed 1321, 53 S Ct 698; *United States v Lewis* (CA6 Ohio) 338 F2d 137, cert den 380 US 978, 14 L Ed 2d 272, 85 S Ct 1342; *People v Ross*, 181 Mich App 89, 449 NW2d 107, app den 433 Mich 907.

21. *Re Marriage of Piercy* (Mo App) 774 SW2d 539.

In a trial before a jury, the court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness. *State v Williams*, 43 Ohio St 2d 88, 72 Ohio Ops 2d 49, 330 NE2d 891.

22. *People v Hicks* (1st Dist) 183 Ill App 3d 636, 132 Ill Dec 193, 539 NE2d 756; *People v*

Ross, 181 Mich App 89, 449 NW2d 107, app den 433 Mich 907.

A trial court has not improperly acted as a prosecutor if its questions were asked only to clarify the evidence. *People v Enoch* (1st Dist) 189 Ill App 3d 535, 136 Ill Dec 905, 545 NE2d 429, app den 129 Ill 2d 567, 140 Ill Dec 676, 550 NE2d 561.

23. *United States v Robinson* (CA2 NY) 635 F2d 981, 7 Fed Rules Evid Serv 663, cert den 451 US 992, 68 L Ed 2d 852, 101 S Ct 2333; *United States v Eldred* (CA9 Ariz) 588 F2d 746; *Romero v State* (Alaska App) 785 P2d 904; *Sanchez v Lauffenburger* (Colo App) 784 P2d 855; *Eggert v Mosler Safe Co.* (Colo App) 730 P2d 895; *State v Hamilton*, 240 Kan 539, 731 P2d 863; *People v Pawelczak*, 125 Mich App 231, 336 NW2d 453; *People v Cooper* (2d Dept) 96 App Div 2d 866, 465 NYS2d 755; *Commonwealth v Hammer*, 508 Pa 88, 494 A2d 1054.

The assumption by the trial judge of the burden of cross-examining the accused in a criminal case with the use of sharp language in framing the questions is reversible error. *People v Cole*, 349 Mich 175, 84 NW2d 711; *Parker v State*, 132 Tenn 327, 178 SW 438.

If, by their tenor, their frequency, or by the persistence of the trial judge, the questions

trial court asks,²⁴ but whether, because of such questioning, the defendant was prejudiced.²⁵

While the court can interrogate witnesses to clarify testimony and insure that a case is tried fairly, the judge may not repeatedly interject himself into the proceedings when the attorneys are conducting their case in a competent manner.²⁶ Nor should the trial judge address a witness in an attempt to get him to change his testimony.²⁷

2. REMARKS AND COMMENTS [§§ 276-306]

a. IN GENERAL [§§ 276-290]

§ 276. Generally

A trial court is given wide discretion in conducting a trial, but the court cannot make comments or insinuations indicating its opinion on the credibility of a witness or the argument of counsel.²⁸ The judge, as the dominant figure in the courtroom, must guard against inadvertent comments or attitude of belief or disbelief, which may prejudice the jury.²⁹ In jury trials, the trial judge should be cautious and circumspect in his language and conduct before the jury.³⁰ It is a trial court's duty to maintain an impartial attitude and a status of neutrality, and keep its questions and comments to a minimum. It is the trial court's duty not to do or say anything that might leave the impression it was not according all of the parties a fair and impartial hearing.³¹

|||| Observation: Even when exposed to great provocation, as courts many times are, utterances that defeat the right of a party to a fair trial are not justified.³²

In the management and control of a trial, the trial judge should avoid intemperate language, both in what he says and how he says it; constant vigilance in avoiding the appearance of partiality, anger, and impatience, is required of trial judges who should be conscious at all times that the high office of a judge requires a temperament consonant with the high calling of

tend to convey the impression of judicial leaning, they constitute prejudicial error. *State v Currie*, 293 NC 523, 238 SE2d 477; *State v Hunt*, 297 NC 258, 254 SE2d 591.

24. *United States v De Fillo* (CA2 NY) 257 F2d 835, cert den 359 US 915, 3 L Ed 2d 577, 79 S Ct 591.

25. *United States v Kelly* (CA3 NJ) 329 F2d 314; *Woodring v United States* (CA8 Mo) 311 F2d 417, cert den 373 US 913, 10 L Ed 2d 414, 83 S Ct 1304.

26. *United States v Benefield* (CA11 Ala) 889 F2d 1061.

27. *Glover v United States* (CA8 Indian Terr) 147 F 426; *Jackson Yellow Cab Co. v Alexander*, 246 Miss 268, 148 So 2d 674; *Williams v Diamond Arrow Cabs, Inc.* (App, Mahoning Co) 84 Ohio L Abs 65, 169 NE2d 651.

28. *People v Enoch* (1989, 1st Dist) 189 Ill App 3d 535, 136 Ill Dec 905, 545 NE2d 429,

app den 129 Ill 2d 567, 140 Ill Dec 676, 550 NE2d 561.

29. *Mattice v Goodman* (1st Dist) 173 Ill App 3d 236, 123 Ill Dec 6, 527 NE2d 469.

30. *Travelers Ins. Co. v Ryan* (CA5 Tex) 416 F2d 362; *Butler v United States* (CA8 ND) 317 F2d 249, 6 ALR3d 582, cert den 375 US 836, 11 L Ed 2d 65, 84 S Ct 67 and cert den 375 US 838, 11 L Ed 2d 65, 84 S Ct 77; *Myers v George* (CA8 Iowa) 271 F2d 168, 83 ALR2d 1121; *Ward v Booth* (CA9 Hawaii) 197 F2d 963, 33 ALR2d 1134; *Skelton v Beall* (Fla App D3) 133 So 2d 477, 94 ALR2d 820; *Drewry v State*, 208 Ga 239, 65 SE2d 916, conformed to 84 Ga App 632, 66 SE2d 806; *Bullock v Sklar* (Mo App) 349 SW2d 381, 90 ALR2d 318; *Turrietta v Wyche*, 54 NM 5, 212 P2d 1041, 15 ALR2d 407.

31. *Vedron v State*, 163 Ind App 28, 321 NE2d 847; *Cundiff v Cline* (Mo App) 752 SW2d 409.

32. *Re Crist* (Mo App) 732 SW2d 587.

the judiciary.³³ The trial judge should avoid making directly to or within the hearing of the jury any remark which is capable directly or indirectly, expressly, inferentially, or by innuendo of conveying any intimation as to what view the judge takes of the case or as to what opinion the judge holds as to the weight, character, or credibility of any evidence adduced.³⁴ No comment or remark should be made by a judge, during the trial of an action, which may tend to excite prejudice or hostility in the minds of the jurors toward one of the party-litigants, or sympathy for the other, but a mere possibility of prejudice from a remark of the judge is not sufficient to overturn a verdict or judgment, and, where a construction can properly and reasonably be given to a remark which will render it unobjectionable, it will not be regarded as prejudicial.³⁵

A trial judge is allowed greater latitude to comment during a bench trial than might be acceptable during a jury trial.³⁶

§ 277. Preliminary address to jury or prospective jurors

Judges sometimes make an oral address to jurors upon their impanelment or at the beginning of a term, relative to the duties of jurors generally. While such addresses have been characterized as proper and timely,³⁷ the judge should be careful to state the law correctly,³⁸ and should be equally careful not to disparage any legitimate defense that may be made in cases tried.³⁹ Remarks made before prospective jurors must be engaged in with the greatest of care and the judge must be careful not to make any statement or suggestion likely to influence the decision of the jurors when called upon later to sit in a given case.⁴⁰

33. *Barnes v Jones Chevrolet Co.* (App) 292 SC 607, 358 SE2d 156.

In recognition of the great influence a trial judge has on a jury, the judge should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury. A comment by the trial judge expressing his opinion as to the facts or evidence presented to the jury is reversible error. *Oglesby v State*, 299 Ark 403, 773 SW2d 443.

34. *Travelers Ins. Co. v Ryan* (CA5 Tex) 416 F2d 362; *Myers v George* (CA8 Iowa) 271 F2d 168, 83 ALR2d 1121; *Flicker v State* (Fla App D5) 374 So 2d 1141; *Gross v Commonwealth* (Ky) 256 SW2d 366; *Planck v State*, 151 Neb 599, 38 NW2d 790; *Heitfeld v Benevolent & Protective Order of Keglers*, 36 Wash 2d 685, 220 P2d 655, 18 ALR2d 983.

The defendant was not accorded a fair and impartial trial where, throughout the trial, the court unduly interjected itself into the proceedings, examining witnesses, including the defendant, with prosecutorial zeal; making personal comments upon the testimony; expressing impatience with the manner in which defense counsel was proceeding; and generally conveying to the jury the court's attitude both in respect to the merits of the case and to the

credibility of the witnesses. *People v Harris* (1st Dept) 44 App Div 2d 809, 355 NYS2d 770.

As to jocularity on the part of the judge, see § 289; as to gestures or facial expressions by the judge, see § 290.

Forms: Instructions to jury to disregard court's intimation of opinion as to facts. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 249.

35. *Plains Transport of Kansas, Inc. v Baldwin*, 217 Kan 2, 535 P2d 865.

36. *Re Marriage of Click* (2d Dist) 169 Ill App 3d 48, 119 Ill Dec 701, 523 NE2d 169, app den 122 Ill 2d 571, 125 Ill Dec 213, 530 NE2d 241; *Minneapolis v Canterbury*, 122 Minn 301, 142 NW 812.

As to non-jury trials, generally, see §§ 1956 et seq.

37. *State v Selman* (Mo) 391 SW2d 193; *Hammett v State*, 84 Tex Crim 635, 209 SW 661, 4 ALR 347.

38. *Attaway v State*, 41 Tex Crim 395, 55 SW 45.

39. § 282.

40. *State v Miller*, 90 Kan 230, 133 P 878; *State v Carriker*, 287 NC 530, 215 SE2d 134.

The failure of the trial judge to advise the

The trial judge's comment during jury selection that making a robbery victim go into a back room was kidnapping had to be regarded as an expression by the judge that conduct similar to that of the accused is kidnapping under state law and could even be construed as an expression of belief in the defendant's guilt, and thus constituted reversible error.⁴¹

The preliminary charge must be construed with reference to the testimony thereafter introduced and as forming a part of the general charge. A judge charging the jury before the introduction of evidence takes the chance that his charge may be misleading and erroneous because inapplicable to the facts of the particular case.⁴²

§ 278. Disclosing motions or proceedings in chambers

Remarks by a trial judge in a civil case, disclosing to the jury motions or other proceedings which have been dealt with in the judge's chambers, or otherwise out of the hearing of the jury, and which were not meant to come to the knowledge of the jurors, have usually been regarded as improper, since obviously the reason for making the motion "in chambers" is precisely to withhold the matter from the knowledge of the jury.⁴³ However, whether such impropriety amounts to prejudicial error must be determined in the light of the circumstances of the individual case.⁴⁴

§ 279. Commenting on failure to produce testimony

Ordinarily, a court may not comment upon a defendant's failure to testify⁴⁵ or otherwise to come forward with evidence,⁴⁶ but, once a defendant does come forward with evidence, his failure to call an available witness who is under defendant's control and has information material to the case may be brought to the jurors' attention for their consideration.⁴⁷ Though the rule ordinarily does not apply when a witness is equally accessible to both parties, it may come into play even then if it appears that such a witness is favorable to one party and hostile to the other. In both instances, so long as comment or instruction on the absence of the witness is unaccompanied by one on the accused's personal failure to testify, no constitutional right is infringed.⁴⁸ It is

jury pool in his pretrial comments that the jury ultimately chosen could find the defendant not guilty was an obvious inadvertence. More importantly, in his charge to the jury chosen, the judge clearly and repeatedly indicated that the jury could return a verdict of not guilty. *State v Bizzell*, 53 NC App 450, 281 SE2d 57.

41. *Lester v State* (Fla App D1) 458 So 2d 1194, 9 FLW 2378.

42. *State v McGee*, 55 SC 247, 33 SE 353.

43. *Commonwealth, Dept. of Highways v Watson* (Ky) 446 SW2d 294; *Robinson v Lunsford* (Ky) 330 SW2d 423, 77 ALR2d 1248.

Annotations: Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 ALR2d 1253.

44. *Commonwealth, Dept. of Highways v Watson* (Ky) 446 SW2d 294; *Robinson v Lunsford* (Ky) 330 SW2d 423, 77 ALR2d 1248.

Annotations: Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 ALR2d 1253.

45. §§ 292, 293.

46. *People v Rodriguez*, 38 NY2d 95, 378 NYS2d 665, 341 NE2d 231.

As to instructions on failure to call witnesses, see § 1315.

47. *People v Rodriguez*, 38 NY2d 95, 378 NYS2d 665, 341 NE2d 231.

48. *People v Rodriguez*, 38 NY2d 95, 378 NYS2d 665, 341 NE2d 231 (holding that the mere fact that an uncalled witness is the spouse of the accused does not alter the situation).

likewise error in federal court for the court, in a criminal case, to comment on the nonproduction of evidence by the accused in aid of the prosecution.⁴⁹

A question by a judge as to why counsel did not call a certain witness is considered an intimation, if not a direct expression, of opinion upon the facts to the prejudice of the client.⁵⁰

§ 280. Commenting on evidence

The courts are not in agreement on the question of whether the trial judge may comment on the evidence. While some jurisdictions adhere to a general rule that the trial court must refrain from commenting on the weight of the evidence in the jury's presence during any stage of the proceeding,⁵¹ and hold that the trial judge should generally not express or intimate an opinion as to controverted facts during a jury trial,⁵² a number of other jurisdictions allow such comment so long as it does not direct the jury as to how to resolve a particular question.⁵³ Indeed, in some cases, it is considered to be the trial

49. *Hibbard v United States* (CA7 Ill) 172 F 66.

50. *Kissic v State*, 266 Ala 71, 94 So 2d 202, 67 ALR2d 530, later app 40 Ala App 178, 110 So 2d 327; *Fourth Nat. Bank v McArthur*, 168 NC 48, 84 SE 39.

51. *Keller v American Medical International, Inc.* (Ala) 534 So 2d 244; *State v Walker*, 266 NC 269, 145 SE2d 833; *Russell v Morehead City*, 90 NC App 675, 370 SE2d 56; *Livingston v State* (Tex App Dallas) 782 SW2d 12, petition for discretionary review ref (Jun 27, 1990); *Heitfeld v Benevolent & Protective Order of Keglers*, 36 Wash 2d 685, 220 P2d 655, 18 ALR2d 983; *State v Detrick*, 55 Wash App 501, 778 P2d 529.

The trial judge's comment that the defendant admitted that he signed a check and that that amounted to forgery was an improper comment on the effect of the evidence of a highly prejudicial nature. *Lyles v State* (Ala App) 342 So 2d 414, cert den (Ala) 342 So 2d 416.

The trial judge's comment analogizing the trial to a baseball game "with the score 17-0, but our side ain't been up yet," might have added credibility to the state's case in the eyes of the jury and amounted to a comment on the weight of the evidence. *State v Reid*, 53 NC App 130, 280 SE2d 46.

The court's finding in the presence of the jury that a witness was an expert in forensic chemistry was simply a ruling upon the qualifications of the witness to testify as to its opinion, and was not an improper expression of his opinion of the facts. *State v Crandall*, 23 NC App 625, 209 SE2d 834, app dismd 286 NC 417, 211 SE2d 797.

As to trial judge's comments during deliberations, see §§ 1580 et seq.; as to trial judge's comments during instructions as invading province of jury, see §§ 1188 et seq.

Forms: Instructions to jury to disregard court's comment on evidence. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 248.

52. *People v Rigney*, 55 Cal 2d 236, 10 Cal Rptr 625, 359 P2d 23, 98 ALR2d 186; *State v Fiedler*, 260 Iowa 1198, 152 NW2d 236; *Nash v Fidelity-Phenix Fire Ins. Co.*, 106 W Va 672, 146 SE 726, 63 ALR 101; *Re Nelson's Estate*, 72 Wyo 444, 266 P2d 238.

53. *People v Robillard*, 55 Cal 2d 88, 10 Cal Rptr 167, 358 P2d 295, 83 ALR2d 1086, cert den 365 US 886, 6 L Ed 2d 199, 81 S Ct 1043 and (disapproved on other grounds by *People v Morse*, 60 Cal 2d 631, 36 Cal Rptr 201, 388 P2d 33, 12 ALR3d 810) and (ovrld by *People v Satchell*, 6 Cal 3d 28, 98 Cal Rptr 33, 489 P2d 1361, 50 ALR3d 383); *State v Cazimovski*, 20 Conn App 190, 565 A2d 254; *York v Maine C.R. Co.*, 84 Me 117, 24 A 790; *State v Rodia*, 132 NJL 199, 39 A2d 484, 156 ALR 523; *Vassallo v Bell*, 221 NJ Super 347, 534 A2d 724; *State v Artis*, 325 NC 278, 384 SE2d 470, vacated on other grounds (US) 108 L Ed 2d 604, 110 S Ct 1466, on remand 327 NC 470, 397 SE2d 223.

A California trial court may comment on the evidence, including the credibility of witnesses, so long as its remarks are accurate, temperate, and scrupulously fair, but the court may not express its views on the ultimate issue of guilt or innocence or otherwise usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses. *People v Melton*, 44 Cal 3d 713, 244 Cal Rptr 867, 750 P2d 741, cert den 488 US 934, 102 L Ed 2d 346, 109 S Ct 329 and stay gr (Cal) 1989 Cal LEXIS 193.

The court need not confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness. *People v Rodri-*

court's duty to refer to testimony in order to assist the jury in relating the facts to the law.⁵⁴ The judge must carefully explain to the jury that it is their duty to determine the facts and the credibility of witnesses, and he must not leave the jury with the impression that they are bound by his comments.⁵⁵ It does, however, constitute reversible error for a court to make a comment on the evidence that is reasonably calculated to prejudice the defendant's rights.⁵⁶

The judge's privilege to comment on the evidence is not unlimited.⁵⁷ His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of the witness; he may analyze and dissect the evidence, but he may neither distort it nor add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The trial judge has a duty to use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided; that deductions and theories not warranted by the evidence should be studiously avoided.⁵⁸ The trial judge may not withdraw material evidence from the jury's consideration or distort the testimony, and he may not, in the guise of comment, control the verdict by direction either directly or impliedly named.⁵⁹

The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.⁶⁰

Whether constitutional or statutory provisions prohibiting a judge from charging on the facts or prohibiting him in his charge from commenting on the weight of evidence⁶¹ are applicable to remarks during the progress of the trial is a question upon which the courts are in conflict.⁶²

guez, 42 Cal 3d 730, 230 Cal Rptr 667, 726 P2d 113, later proceeding (Cal) 1989 Cal LEXIS 185, habeas corpus proceeding (Cal App 1st Dist) 1991 Cal App LEXIS 408.

A trial court has liberal discretion to comment on the evidence as long as it does not misstate or unfairly summarize the evidence and thereby invade the province of the jury as the trier of the facts. *State v Paladino*, 19 Conn App 576, 563 A2d 321.

A trial judge acts within his province when he assists the jury by examining and commenting upon the evidence. In performing this function, the judge may comment on the credibility of witnesses. *Watkins v United States* (Dist Col App) 379 A2d 703.

It is not improper for a trial judge to state that certain evidence "tends to show" a certain fact. *State v McDonald*, 23 NC App 286, 208 SE2d 915.

As to the rule permitting a charge on the facts and the weight of the evidence, see § 1195.

54. *State v Cazimovski*, 20 Conn App 190, 565 A2d 254; *State v Paladino*, 19 Conn App 576, 563 A2d 321.

55. *Watkins v United States* (Dist Col App) 379 A2d 703.

56. *Higdon v State* (Tex App Houston (1st Dist)) 764 SW2d 308, petition for discretionary review ref.

57. *People v Oliver* (4th Dist) 46 Cal App 3d 747, 120 Cal Rptr 368; *Watkins v United States* (Dist Col App) 379 A2d 703.

58. *Watkins v United States* (Dist Col App) 379 A2d 703 (also holding that it is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf).

59. *People v Oliver* (4th Dist) 46 Cal App 3d 747, 120 Cal Rptr 368.

60. *People v Melton*, 44 Cal 3d 713, 244 Cal Rptr 867, 750 P2d 741, cert den 488 US 934, 102 L Ed 2d 346, 109 S Ct 329 and stay gr (Cal) 1989 Cal LEXIS 193; *People v Rodriguez*, 42 Cal 3d 730, 230 Cal Rptr 667, 726 P2d 113, later proceeding (Cal) 1989 Cal LEXIS 185, habeas corpus proceeding (Cal App 1st Dist) 1991 Cal App LEXIS 408.

61. §§ 1195 et seq.

62. *State v Walker*, 266 NC 269, 145 SE2d 833 (statute held applicable to any stage of the trial).

A statute forbidding a judge in charging the

§ 281. —Federal practice

Federal trial judges are accorded the right to comment upon the evidence to the jury.⁶³ In the federal courts, the judge presiding at a trial, civil or criminal, is authorized, whenever he thinks that the jury will assist the jury in arriving at a just conclusion, to express to the jury his opinion on the questions of fact which he submits to its determination.⁶⁴ The reason for this rule is that the trial judge should, by reason of his training and experience, be permitted to assist the jury in determining what evidence has a bearing on the disputed issues in the case, and aid it in weighing the evidence,⁶⁵ taking care that the jurors clearly understand that it is their own judgment⁶⁶ which must finally determine what the facts are.⁶⁷ Although his power in this respect is not curtailed by the circumstance of disagreement of the jurors,⁶⁸ it does have its limitations.⁶⁹ The judge's comments may not prejudice⁷⁰ or mislead the jury.⁷¹ The judge's remarks must be judicial and dispassionate⁷² and not argumentative.⁷³ The judge is precluded from giving a one-sided charge in the nature of an argument,⁷⁴ or from assuming the role of an advocate.⁷⁵

jury to present the facts, and requiring that he inform them that they are exclusive judges of questions of fact, was violated by remarks made in passing upon the admissibility of evidence. *Keen v Keen*, 49 Or 362, 90 P 147.

63. *United States v Mobile Materials, Inc.* (CA10 Okla) 881 F2d 866, 1989-2 CCH Trade Cases ¶ 68682, 28 Fed Rules Evid Serv 636, cert den (US) 107 L Ed 2d 833, 110 S Ct 837; *Haines v Powermatic Houdaille, Inc.* (CA8 Mo) 661 F2d 94, CCH Prod Liab Rep ¶ 9097.

A Federal District Court judge retains the common-law power to explain, summarize, and comment on the facts and evidence. *United States v Paiva* (CA1 Me) 892 F2d 148, 29 Fed Rules Evid Serv 789.

As to the right of trial judges to comment upon the evidence to the jury as a common-law power not regulated by the Federal Rules of Civil Procedure, see 33 Federal Procedure, L Ed, Trial § 77:195.

64. *Quercia v United States*, 289 US 466, 77 L Ed 1321, 53 S Ct 698; *Lawlor v Loewe*, 235 US 522, 59 L Ed 341, 35 S Ct 170 (superseded by statute on other grounds as stated in *Burlington N.R. Co. v Brotherhood of Maintenance of Way Employees* (CA7 Ill) 793 F2d 795, 122 BNA LRRM 2886, 104 CCH LC ¶ 11874); *Wiborg v United States*, 163 US 632, 41 L Ed 289, 16 S Ct 1127; *Cincinnati Siemens-Lungren Gas Illuminating Co. v Western Siemens-Lungren Co.*, 152 US 200, 38 L Ed 411, 14 S Ct 523; *Doyle v Union P.R. Co.*, 147 US 413, 37 L Ed 223, 13 S Ct 333; *Simmons v United States*, 142 US 148, 35 L Ed 968, 12 S Ct 171; *Lovejoy v United States*, 128 US 171, 32 L Ed 389, 9 S Ct 87; *Rucker v Wheeler*, 127 US 35, 32 L Ed 102, 8 S Ct 1142; *Myers v George* (CA8 Iowa) 271 F2d 168, 83 ALR2d 1121; *Kesley v United States* (CA5 Fla) 47 F2d 453, 85 ALR 1418.

As to the rule in federal courts regarding permitting a charge on the facts and the weight of the evidence, see § 1196.

65. *United States v Murdock*, 290 US 389, 78 L Ed 381, 54 S Ct 223, 3 USTC ¶ 1194, 13 AFTR 821 (ovrld on other grounds by *Murphy v Waterfront Com. of New York Harbor*, 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594, 56 BNA LRRM 2544, 49 CCH LC ¶ 51102, motion den 379 US 898, 13 L Ed 2d 174, 85 S Ct 183) as stated in *People v Smith* (3d Dist) 102 Ill App 3d 226, 57 Ill Dec 753, 429 NE2d 870.

66. *Quercia v United States*, 289 US 466, 77 L Ed 1321, 53 S Ct 698.

67. *Malaga v United States* (CA1 Mass) 57 F2d 822.

68. *Kesley v United States* (CA5 Fla) 47 F2d 453, 85 ALR 1418.

69. *United States v Smith* (CA6 Ky) 399 F2d 896, 7 ALR Fed 370.

70. *Haines v Powermatic Houdaille, Inc.* (CA8 Mo) 661 F2d 94, CCH Prod Liab Rep ¶ 9097.

71. *United States v Mobile Materials, Inc.* (CA10 Okla) 881 F2d 866, 1989-2 CCH Trade Cases ¶ 68682, 28 Fed Rules Evid Serv 636, cert den (US) 107 L Ed 2d 833, 110 S Ct 837; *Haines v Powermatic Houdaille, Inc.* (CA8 Mo) 661 F2d 94, CCH Prod Liab Rep ¶ 9097.

72. *Quercia v United States*, 289 US 466, 77 L Ed 1321, 53 S Ct 698.

73. *Quercia v United States*, 289 US 466, 77 L Ed 1321, 53 S Ct 698.

74. *Quercia v United States*, 289 US 466, 77 L Ed 1321, 53 S Ct 698.

§ 282. Disparaging or discrediting defense

Disparaging remarks by the trial judge with regard to the defense may constitute prejudicial error.⁷⁶ He should not discredit the defense relied on,⁷⁷ and he should also be careful not to disparage any legitimate defenses that may be made in a subsequent trial.⁷⁸

§ 283. Disparaging or discrediting subject matter or importance of litigation

Remarks by the judge during the trial disparaging the subject matter of the litigation, or indicating that it is of only trivial concern, have been held to be prejudicial and to constitute reversible error.⁷⁹ However, there was no merit to appellant's contention that comments by the trial justice were manifestly prejudicial where, while the trial justice did, at one point, allude to the actual amount of land involved in the dispute as being trivial, he emphasized that even if land could be considered trivial, a landowner had a right to have a trial as to where his land ended and his neighbor's began.⁸⁰

§ 284. Remarks when making rulings

Although a judge may always properly exclude inadmissible evidence, he is prohibited from doing so in a manner which intimates any judicial favoritism.⁸¹ To threaten that the outcome of a case will be negatively affected by the presentation of appropriate objections converts intemperance to violations of

75. *Frantz v United States* (CA6 Mich) 62 F2d 737.

76. *Ward v Westland Plastics, Inc.* (CA9 Cal) 651 F2d 1266, 23 BNA FEP Cas 128, 23 CCH EPD ¶ 31093 (disapproved on other grounds by Texas Dept. of Community Affairs v *Burdine*, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089, 25 BNA FEP Cas 113, 25 CCH EPD ¶ 31544, 9 Fed Rules Evid Serv 1, on remand (CA5 Tex) 647 F2d 513, 25 BNA FEP Cas 1746, 26 CCH EPD ¶ 31898) as stated in *Sumner v San Diego Urban League, Inc.* (CA9 Cal) 681 F2d 1140, 29 BNA FEP Cas 707, 29 CCH EPD ¶ 32970; *Krasowski v Greyhound Lines, Inc.* (CA6 Ohio) 402 F2d 445, 19 Ohio Misc 179, 46 Ohio Ops 2d 291; *McNeill v Durham County ABC Bd.*, 322 NC 425, 368 SE2d 619; *Thompson v Angel*, 214 NC 3, 197 SE 618.

As to the disparagement of defenses in final instructions, see § 1260.

Annotations: Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging the litigants, the witnesses, or the subject matter of the litigation, 83 ALR2d 1128 § 6[b].

77. *State v Lauth*, 46 Or 342, 80 P 660; *Commonwealth v Brown*, 309 Pa 515, 164 A 726, 86 ALR 892; *State v King*, 50 Wash 312, 97 P 247.

78. *Gross v Commonwealth* (Ky) 256 SW2d 366; *Attaway v State*, 41 Tex Crim 395, 55 SW 45.

79. *Cromling v Pittsburgh & L.E.R. Co.* (CA3 Pa) 327 F2d 142; *Myers v George* (CA8 Iowa) 271 F2d 168, 83 ALR2d 1121; *La Chase v Sanders*, 142 Conn 122, 111 A2d 690; *White-night v International Patrol & Detective Agency, Inc.* (Fla App D3) 483 So 2d 473, 11 FLW 400, review den (Fla) 492 So 2d 1333; *Rose v Vasseur* (Ky) 358 SW2d 540; *Coneys v New York* (2d Dept) 48 App Div 2d 651, 367 NYS2d 559; *Habenicht v R.K.O. Theatres, Inc.* (1st Dept) 23 App Div 2d 378, 260 NYS2d 890; *McNeill v Durham County ABC Bd.*, 322 NC 425, 368 SE2d 619.

As to remarks by the trial judge disparaging the litigants in a civil case tried to the jury, see § 310.

As to the trial judge's remarks disparaging the accused during trial, see § 291.

As to the trial judge's disparaging remarks as to witnesses, see §§ 299, 315.

Annotations: Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging the litigants, the witnesses, or the subject matter of the litigation, 83 ALR2d 1128 § 6[a].

80. *Rosa v Oliveira*, 115 RI 277, 342 A2d 601.

81. *Atlantic C.L.R. Co. v Powell*, 127 Ga 805, 56 SE 1006; *People v Lewerenz*, 24 Ill 2d 295, 181 NE2d 99, 93 ALR2d 1092; *Hansen v State*, 141 Neb 278, 3 NW2d 441; *State v Hughes*, 54 NC App 117, 282 SE2d 504.

judicial duty.⁸²

While generally the judge should not express within the jury's hearing his or her opinion as to what has or has not been proved, such an expression or intimation, when not flagrant, is not a violation when made during discussion with counsel concerning the admissibility of testimony on explaining the ruling.⁸³ The court has the right to explain its decision on objections to evidence and, if pertinent, such reasons do not constitute prohibited expressions of opinion.⁸⁴ Judges are not prohibited from stating the facts upon which their conclusions are based,⁸⁵ or the purpose of questions propounded,⁸⁶ from alluding to or stating the evidence in the record;⁸⁷ or from stating that there is no evidence as to a matter,⁸⁸ provided that the statement is true.⁸⁹ A remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial.⁹⁰

In ruling on a motion for a nonsuit or directed verdict, the court may express an opinion on the sufficiency of the plaintiff's evidence,⁹¹ or state the

82. *Ensco International, Inc. v Blegen* (Minn App) 410 NW2d 11.

83. *Starks v Robinson*, 189 Ga App 168, 375 SE2d 86, cert den 258 Ga 828, 377 SE2d 503.

84. *Woods v Pacific Greyhound Lines*, 91 Cal App 2d 572, 205 P2d 738; *Starks v Robinson*, 189 Ga App 168, 375 SE2d 86, cert den 258 Ga 828, 377 SE2d 503; *Le Blanc v Ford Motor Co.*, 346 Mass 225, 191 NE2d 301, 6 ALR3d 83; *State v Rice*, 38 Wis 2d 344, 156 NW2d 409.

85. *State v Hills*, 241 La 345, 129 So 2d 12; *Hennenfent v Flath* (ND) 66 NW2d 533; *State v Rice*, 38 Wis 2d 344, 156 NW2d 409.

86. *Garner v State*, 28 Fla 113, 9 So 835; *State v Wellman*, 102 Kan 503, 170 P 1052; *State v Rice*, 38 Wis 2d 344, 156 NW2d 409.

87. *Birmingham Fire Ins. Co. v Pulver*, 126 Ill 329, 18 NE 804; *Le Blanc v Ford Motor Co.*, 346 Mass 225, 191 NE2d 301, 6 ALR3d 83; *State v Rice*, 38 Wis 2d 344, 156 NW2d 409.

88. *State v Schuman*, 89 Wash 9, 153 P 1084; *State v Rice*, 38 Wis 2d 344, 156 NW2d 409.

89. *Bruggeman v Illinois C.R. Co.*, 147 Iowa 187, 123 NW 1007; *State v Rice*, 38 Wis 2d 344, 156 NW2d 409.

90. *People v Harris*, 123 Ill 2d 113, 122 Ill Dec 76, 526 NE2d 335, cert den 488 US 902, 102 L Ed 2d 240, 109 S Ct 251, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 3192, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 12854; *State v Fiedler*, 260 Iowa 1198, 152 NW2d 236; *State v Mahkuk*, 220 Kan 74, 551 P2d 869; *State v Williams* (La App 1st Cir) 500 So 2d 811; *State v Reynolds*, 41 Nj 163, 195 A2d 449, 1 ALR3d 1438, cert den 377 US 1000, 12 L Ed 2d 1050, 84 S Ct 1930,

reh den 379 US 873, 13 L Ed 2d 80, 85 S Ct 22 and cert den 377 US 1000, 12 L Ed 2d 1050, 84 S Ct 1934, reh den 379 US 873, 13 L Ed 2d 81, 85 S Ct 23; *State v Lednum*, 51 NC App 387, 276 SE2d 920, petition den 303 NC 317, 281 SE2d 656; *Heitfeld v Benevolent & Protective Order of Keglers*, 36 Wash 2d 685, 220 P2d 655, 18 ALR2d 983.

A trial judge's remarks to counsel suggesting that he was too frequently interrupting opposing counsel's closing argument did not suggest to the jury that defense counsel was not worthy of their belief, and revealed no more than the judge's concern with the orderly progression of the trial. *United States v Blakey* (CA7 Ill) 607 F2d 779, 60 ALR Fed 509 (disapproved on other grounds by *Idaho v Wright* (US) 111 L Ed 2d 638, 110 S Ct 3139, 30 Fed Rules Evid Serv 24) as stated in *United States v Harty* (CA7) 1991 US App LEXIS 7378.

The trial court's statement, in ruling on an objection premised on repetitiveness, that "yes, I think she has been over that and most of this other testimony," did not improperly express dissatisfaction with the manner in which the defendant was presenting his evidence. *State v Hughes*, 54 NC App 117, 282 SE2d 504.

Annotations: Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166 § 32[a-c].

Forms: Instruction—Remarks by court in making rulings not intended as comment on evidence or credibility. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 130.

91. *Fraim v National Fire Ins. Co.*, 170 Pa 151, 32 A 613.

Generally, as to nonsuit and the direction of the verdict, see §§ 853 et seq.

testimony about which there is no dispute.⁹²

Generally, the best procedure for a court to follow is merely to rule on the objection or motion without comment on what the evidence shows.⁹³

§ 285. Reference to possibility of correction by other authorities

A statement by the court to or before the jury in a criminal case that if the jurors make a mistake in returning a verdict or finding of fact against the accused, it can be corrected by another authority, constitutes prejudicial error if it is apparent from the record that in all reasonable probability the jurors, with the thought that a correction could be so made, were remiss in the performance of the duty which the law places upon them as factfinders, to the detriment of the defendant.⁹⁴ If, however, upon the whole record, it appears that under no reasonable factual hypothesis were the jurors, thinking that a mistake of theirs could be so corrected, remiss in their duties as finders of fact, there is no basis for finding prejudicial error even though there is language incidentally susceptible to an objectable construction.⁹⁵

§ 286. Reference to possibility of pardon or parole

Generally, it is prejudicial error for a court, trying a capital case to a jury, to comment upon the fact that in the event a prison term is imposed, the sentence may be reduced and the prisoner released before the expiration of sentence, as a result of pardon or parole. Such prejudice is especially likely to be found where a death sentence was imposed following such comment,⁹⁶ although the same result has been reached in some cases not involving a death

92. *State v Quinn*, 111 SC 174, 97 SE 62, 3 ALR 1500.

93. *Goldman v State*, 128 Neb 684, 260 NW 373; *Mason v State*, 74 Tex Crim 256, 168 SW 115.

94. *United States v Fiorito* (CA7 Ill) 300 F2d 424, 5 ALR3d 968; *People v Ramos*, 37 Cal 3d 136, 207 Cal Rptr 800, 689 P2d 430, cert den 471 US 1119, 86 L Ed 2d 266, 105 S Ct 2367; *Price v State*, 149 Ga App 397, 254 SE2d 512; *Holland v Commonwealth* (Ky) 703 SW2d 876; *State v Mount*, 30 NJ 195, 152 A2d 343.

As to comments by the trial judge in the charge on the possibility of the accused's being given a suspended sentence, see § 1442.

Annotations: Prejudicial effect of statement of court that if jury makes mistake in convicting it can be corrected by other authorities, 5 ALR3d 974 § 4.

95. *United States v Greenberg* (CA2 NY) 445 F2d 1158; *State v Le Blanc* (Me) 290 A2d 193; *State v Brookshire* (Mo) 353 SW2d 681, cert den 371 US 67, 9 L Ed 2d 119, 83 S Ct 155; *Hill v State*, 78 Okla Crim 384, 148 P2d 992; *State v Conyers*, 276 SC 688, 281 SE2d 484; *O'Dell v Commonwealth*, 234 Va 672, 364 SE2d 491, cert den 488 US 871, 102 L Ed 2d 154, 109 S Ct 186, reh den 488 US 977, 102 L Ed 2d 554, 109 S Ct 521.

The trial court's comment to the jury that

their decision between life without parole and death was only advisory, and that such decision would ultimately rest in the trial court, did not constitute prejudicial error where the remark did not have an effect on the sentencing decision in that the jury, in fact, recommended life without parole. *Hooks v State* (Ala App) 534 So 2d 329, affd (Ala) 534 So 2d 371, cert den 488 US 1050, 102 L Ed 2d 1005, 109 S Ct 883, reh den 489 US 1092, 103 L Ed 2d 865, 109 S Ct 1562.

Annotations: Prejudicial effect of statement of court that if jury makes mistake in convicting it can be corrected by other authorities, 5 ALR3d 974 § 5.

96. *Westbrook v State*, 265 Ark 736, 580 SW2d 702, later app 274 Ark 309, 624 SW2d 433, later proceeding (Ark) 1991 Ark LEXIS 68; *Re Shipp*, 62 Cal 2d 547, 43 Cal Rptr 3, 399 P2d 571, cert den 382 US 1012, 15 L Ed 2d 528, 86 S Ct 623; *People v Garrison*, 47 Cal 3d 746, 254 Cal Rptr 257, 765 P2d 419, reh den; *People v Johnson*, 47 Cal 3d 576, 253 Cal Rptr 710, 764 P2d 1087, reh den, cert den (US) 107 L Ed 2d 62, 110 S Ct 98; *People v Warren*, 45 Cal 3d 471, 247 Cal Rptr 172, 754 P2d 218; *State v Norris*, 285 SC 86, 328 SE2d 339.

Annotations: Prejudicial effect of statement or instruction of court as to possibility of parole or pardon, 12 ALR3d 832 § 3.

sentence.⁹⁷ There are, however, cases which have sustained a death sentence which followed such a comment,⁹⁸ and the courts have been less ready to find that prejudicial error resulted from such comment where the sentence did not involve capital punishment.⁹⁹

97. *Andrews v State*, 251 Ark 279, 472 SW2d 86; *Smith v State* (Del Sup) 317 A2d 20; *Boyle v Commonwealth* (Ky App) 694 SW2d 711; *State v Zuidema*, 157 Mont 367, 485 P2d 952; *People v Morris* (2d Dept) 39 App Div 2d 750, 332 NYS2d 248; *Baker v State* (Okla Crim) 514 P2d 943; *Suits v State* (Okla Crim) 507 P2d 1260; *Cox v State* (Okla Crim) 491 P2d 357; *Chuculate v State* (Okla Crim) 487 P2d 1000; *Carr v State* (Okla Crim) 417 P2d 833; *Miller v State* (Tex App Dallas) 772 SW2d 491; *Woods v State* (Tex App Houston (1st Dist)) 764 SW2d 281; *Wheatly v State* (Tex App Houston (1st Dist)) 764 SW2d 271 (disapproved on other grounds by *Arnold v State* (Tex Crim) 784 SW2d 372, reported at, and (Tex Crim) 786 SW2d 295, motion for rehearing on PDR denied and cert den (US) 112 L Ed 2d 80, 111 S Ct 110) as stated in *Hugill v State* (Tex App Houston (14th Dist)) 787 SW2d 455, petition for discretionary review ref; *Flores v State* (Tex App San Antonio) 764 SW2d 37; *Kelly v State* (Tex App El Paso) 762 SW2d 225, petition for discretionary review ref and motion for rehearing on PDR denied; *Hosey v State* (Tex App Corpus Christi) 760 SW2d 778, petition for discretionary review ref; *Guerra v State* (Tex App Corpus Christi) 760 SW2d 681; *Urbano v State* (Tex App Houston (1st Dist)) 760 SW2d 33, petition for discretionary review ref and later app (Tex App Houston (14th Dist)) 1991 Tex App LEXIS 783; *Barreda v State* (Tex App Corpus Christi) 760 SW2d 1, petition for discretionary review ref and petition for discretionary review dismd (Tex Crim) 1988 Tex Crim App LEXIS 245; *Howell v State* (Tex App Houston (1st Dist)) 757 SW2d 513, petition for discretionary review ref; *Gil v State* (Tex App Austin) 756 SW2d 108; *Turner v State* (Tex App Dallas) 751 SW2d 240, petition for discretionary review ref; *Caldwell v Commonwealth*, 221 Va 291, 269 SE2d 811; *State v Lindsey*, 160 W Va 284, 233 SE2d 734.

In a prosecution for murder, the defendant was entitled to have his guilt or innocence determined without regard to his eligibility for parole; thus, the defendant's conviction would be reversed where the instructions with respect to parole eligibility left the jury with the false impression that there was no real distinction between the penalties for murder and manslaughter. *State v Brooks*, 271 SC 355, 247 SE2d 436.

Annotations: Prejudicial effect of statement or instruction of court as to possibility of parole or pardon, 12 ALR3d 832 § 5.

98. *Rogers v State*, 101 Nev 457, 705 P2d

664, cert den 476 US 1130, 90 L Ed 2d 679, 106 S Ct 1999, later proceeding (DC Nev) 701 F Supp 757, later proceeding (DC Nev) 717 F Supp 706; *McKague v State*, 101 Nev 327, 705 P2d 127, cert den 474 US 1038, 88 L Ed 2d 585, 106 S Ct 607; *Summers v State*, 86 Nev 210, 467 P2d 98; *Merriman v State* (Okla Crim) 499 P2d 477; *State v Leland*, 190 Or 598, 227 P2d 785, affd 343 US 790, 96 L Ed 1302, 72 S Ct 1002, reh den 344 US 848, 97 L Ed 659, 73 S Ct 4 and (ovrld on other grounds by *Mullaney v Wilbur*, 421 US 684, 44 L Ed 2d 508, 95 S Ct 1881 (diverged from by *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319)) as stated in *Reed v Ross*, 468 US 1, 82 L Ed 2d 1, 104 S Ct 2901 (diverged from by *Teague v Lane*, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060, reh den 490 US 1031, 104 L Ed 2d 206, 109 S Ct 1771 and (not followed by *Cowell v Leapley* (SD) 458 NW2d 514)) as stated in *Rodriguez v Young* (CA7 Wis) 906 F2d 1153, reh den (CA7) 1990 US App LEXIS 13708 and cert den (US) 112 L Ed 2d 688, 111 S Ct 698; *State v Goolsby*, 275 SC 110, 268 SE2d 31, cert den 449 US 1037, 66 L Ed 2d 500, 101 S Ct 616; *State v Atkinson*, 253 SC 531, 172 SE2d 111, vacated on other grounds 408 US 936, 33 L Ed 2d 752, 92 S Ct 2859; *Commonwealth v Sykes*, 353 Pa 392, 45 A2d 43, cert den 328 US 847, 90 L Ed 1620, 66 S Ct 1021, reh den 328 US 880, 90 L Ed 1648, 66 S Ct 1363.

In a prosecution for murder, in which the defendant was convicted and sentenced to death, a jury instruction which referred to parole eligibility after a minimum of 10 years was not error since it did not mislead the jury or enlarge on the matter of parole. *Petrocelli v State*, 101 Nev 46, 692 P2d 503.

Annotations: Prejudicial effect of statement or instruction of court as to possibility of parole or pardon, 12 ALR3d 832 § 4.

99. *Clark v Lockhart* (CA8 Ark) 512 F2d 235, cert den 423 US 872, 46 L Ed 2d 103, 96 S Ct 139; *McKee v State*, 159 Fla 794, 33 So 2d 50; *People v De Berry* (1st Dist) 72 Ill App 2d 279, 219 NE2d 701; *Tyson v State*, 270 Ind 458, 386 NE2d 1185; *Abernathy v Commonwealth* (Ky) 439 SW2d 949 (ovrld on other grounds by *Blake v Commonwealth* (Ky) 646 SW2d 718); *State v Shilow*, 252 La 1105, 215 So 2d 828, cert den 397 US 927, 25 L Ed 2d 106, 90 S Ct 932; *People v MacLeod*, 104 Mich App 6, 304 NW2d 275; *Radcliff v State* (Okla Crim) 490 P2d 1398; *Armstrong v State* (Tenn Crim) 548 SW2d 334; *Hupp v State* (Tex App Dallas) 774

Where the evidence of guilt justifying a life sentence is overwhelming, and the court gives a cautionary instruction after giving a parole instruction, the error may be harmless.¹

§ 287. Suggestion of compromise or reconciliation

Even where he names the amount which he thinks should be paid, a trial judge's suggestion to the defendant's counsel out of the hearing of the jury that he ought to settle the case does not violate a constitutional provision guaranteeing impartial judges.² A judge must not, however, impose his views regarding settlement upon litigants called into chambers, or other extrajudicial private conference, as his duty lies in seeing a settlement wrought by the parties, not by him.³

Where a trial judge makes clear in open court his hostility to a certain party, and attempts to induce that party to settle, lest the case go hard with him, reversible error occurs.⁴ Where a trial judge has remarked on compromise, but in a judicious manner, or in a way serving clarity, and has not imparted a qualitative character to his comments, or rendered a value judgment as to one of the parties, the courts have generally held that no error occurred, or that if there was error, it was not harmful, improper, or prejudicial.⁵ If the trial judge does not force his will upon the parties, and they are both aware of his remarks, especially when represented by counsel, comments in chambers ordinarily have been held not to be prejudicial.⁶

In a few cases, attempts have been made to have the trial judge disqualified

SW2d 56, aff'd (Tex Crim) 801 SW2d 920; *Rische v State* (Tex App Houston (1st Dist)) 746 SW2d 287, remanded (Tex Crim) 755 SW2d 477, on remand (Tex App Houston (1st Dist)) 757 SW2d 518, petition for discretionary review ref (Dec 21, 1988) and habeas corpus proceeding (Tex App Houston (1st Dist)) 1989 Tex App LEXIS 2970; *State v Canfield*, 26 Utah 2d 149, 486 P2d 1034.

Annotations: Prejudicial effect of statement or instruction of court as to possibility of parole or pardon, 12 ALR3d 832 § 6.

1. *Ray v State* (Tex App Houston (14th Dist)) 764 SW2d 406, petition for discretionary review ref (Jun 28, 1989); *Le v State* (Tex App Houston (14th Dist)) 763 SW2d 504.

2. *Harrington v Boston E.R. Co.*, 229 Mass 421, 118 NE 880, 2 ALR 1057.

Annotations: Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 ALR3d 1457 § 4.

3. *Allen v Allen*, 132 Kan 468, 295 P 705, 73 ALR 1006.

Annotations: Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 ALR3d 1457 § 5[a].

4. *Turrietta v Wyche*, 54 NM 5, 212 P2d

1041, 15 ALR2d 407; *Brown v Schneider* (3d Dept) 32 App Div 2d 712, 299 NYS2d 965, app dismd 25 NY2d 903, 304 NYS2d 595, 252 NE2d 129.

Annotations: Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 ALR3d 1457 § 3[a].

5. *Washington v Sterling* (Mun Ct App Dist Col) 91 A2d 844; *Martin v Johns* (Fla) 78 So 2d 398; *Tonkoff v Tonkoff*, 66 Wash 2d 928, 405 P2d 728.

6. *Franks v Nimmo* (CA10 Colo) 796 F2d 1230; *MacLeod v D. C. Transit System, Inc.*, 108 App DC 399, 283 F2d 194, 3 FR Serv 2d 1036; *Gardner v Mobil Oil Co.* (1st Dist) 217 Cal App 2d 220, 31 Cal Rptr 731, 6 ALR3d 1451; *Fagala v Sanders* (5th Dist) 140 Ill App 3d 429, 94 Ill Dec 846, 488 NE2d 1093; *Chertkof v Harry C. Weiskittel Co.*, 251 Md 544, 248 A2d 373, cert den 394 US 974, 22 L Ed 2d 754, 89 S Ct 1467; *Herzfeld v J & M Realty Associates* (2d Dept) 151 App Div 2d 644, 542 NYS2d 374; *Standard Acci. Ins. Co. v Mize* (Tex Civ App Amarillo) 378 SW2d 686.

Annotations: Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 ALR3d 1457 § 5[b].

because of his comments as to compromise or settlement.⁷ Where the record has shown no bias affecting the result, judges have not been disqualified, unless the general atmosphere of the trial and the ideal of judicial impartiality might be served thereby.⁸

§ 288. Remarks as to matters of law

A remark by a trial judge with reference to a question of law is not an invasion of the province of the jury.⁹ It is not error for the court in response to a juror's question as to the necessity of an extended cross-examination to state that the court is powerless unless objection is made.¹⁰ It is error, however, for a judge, after stating that he is bound to rule a certain way, to remark that this is the ruling of the appellate court, but that his individual opinion is to the contrary.¹¹

A trial judge should not read to the jury abstracts from opinions, statutes, or any other lawbook, and he should be careful to say no more than is necessary to decide the questions presented therein, since side remarks or expressions of opinion coming from a trial judge often have a great weight with the jury.¹²

§ 289. Manner and tone of remarks; jocularity

Well-conceived judicial humor can be a welcome relief during a long, tense trial. Obviously, however, the court should refrain from joking remarks which the jury might interpret as denigrating a particular party or his attorney,¹³ and a criminal trial, where the defendant faces the loss of liberty, is not the place for the trial judge to resort to humor, at the expense of the defendant.¹⁴

While it has frequently been held that remarks otherwise harmless cannot be shown to be harmful on account of the manner or tone of voice in which they are made, since such matters cannot be carried into the record,¹⁵ some cases

7. As to disqualification of a judge, see 46 Am Jur 2d, Judges §§ 86 et seq.

8. *Franks v Nimmo* (CA10 Colo) 796 F2d 1230; *Re Nevitt* (CA8 Mo) 117 F 448; *Garcia v Estate of Norton* (1st Dist) 183 Cal App 3d 413, 228 Cal Rptr 108; *Timm v Timm*, 195 Conn 202, 487 A2d 191; *Southern Builders, Inc. v Carla Charcoal, Inc.* (La App 3d Cir) 357 So 2d 638, cert den (La) 358 So 2d 632; *Herzfeld v J & M Realty Associates* (2d Dept) 151 App Div 2d 644, 542 NYS2d 374; *Nelson v Dodge*, 76 RI 1, 68 A2d 51, 14 ALR2d 638.

Where the judge at a pretrial conference urged the parties to settle their civil case or they would be guaranteed "much pain" and also made other improper comments and orders, reassignment of the case to another judge was necessary. *Continental Ins. Co. v First Wyoming Bank, N.A. - Jackson Hole* (Wyo) 771 P2d 374.

Annotations: 6 ALR3d 1457 § 6.

9. *Gardner v Mobil Oil Co.* (1st Dist) 217 Cal App 2d 220, 31 Cal Rptr 731, 6 ALR3d 1451.

A trial court did not abuse its discretion by explaining to prospective jurors certain legal

concepts later included in the judge's general charge. *State v Badon* (La) 338 So 2d 665.

10. *State v Aker*, 54 Wash 342, 103 P 420.

11. *Beason v State*, 43 Tex Crim 442, 67 SW 96.

12. *State v Locks*, 94 Ariz 134, 382 P2d 241; *Commonwealth ex rel. Curlin v Moyers* (Ky) 280 SW2d 513.

13. *People v Melton*, 44 Cal 3d 713, 244 Cal Rptr 867, 750 P2d 741, cert den 488 US 934, 102 L Ed 2d 346, 109 S Ct 329 and stay gr (Cal) 1989 Cal LEXIS 193.

14. *United States ex rel. Harding v Marks* (ED Pa) 403 F Supp 946.

15. *Todd v Boston E.R. Co.*, 208 Mass 505, 94 NE 683; *State v Driggers*, 84 SC 526, 66 SE 1042.

Annotations: Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166 § 9.

Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 ALR2d 826 §§ 16, 17.

hold that the manner in which remarks are made may affect their prejudicial character. On this principle, jocular remarks may be held harmless,¹⁶ although they have also been held to constitute prejudicial error.¹⁷ For instance, one court has held that tongue-in-cheek remarks which announce that the judge will favor one party over another are grossly improper, and if such remarks are made, the judge who makes them must stand down from any controversy in which he has indicated a bias.¹⁸

§ 290. Gestures or facial expressions

Generally, facial expressions or gestures on the part of the trial judge will not be deemed prejudicial error where the conduct cannot be said to exceed the permissible bounds of judicial comment,¹⁹ where the conduct can be said to be a natural response to the stimulus,²⁰ or where the error, if any, can be said to have been cured by an instruction.²¹

Gestures or facial expressions of the trial judge in a criminal trial have been held to amount to prejudicial error,²² as has the refusal of the trial judge to permit an exception to be made thereto.²³

Counsel for the defendant in a criminal trial might prefer not to risk antagonizing the trial judge by objecting to or criticizing his gestures or facial expressions, but failure to properly preserve such a ground of error can be fatal to an appeal.²⁴ The suggested procedure for preserving such a ground of

16. *Billeci v United States*, 87 App DC 274, 184 F2d 394, 24 ALR2d 881; *State v Worsham (Mo)* 416 SW2d 940; *Cook v Atlantic C.L.R. Co.*, 196 SC 230, 13 SE2d 1, 133 ALR 1144; *Flora v Scott (Tex Civ App Dallas)* 398 SW2d 627, writ ref n r e.

As to the manner and tone in giving instructions, see § 1104.

17. *Commonwealth, Dept. of Highways v Eubank (Ky)* 369 SW2d 15.

18. *Judicial Inquiry & Review Bd. of Supreme Court v Fink*, 516 Pa 208, 532 A2d 358.

19. *United States v Hill (CA10 Kan)* 526 F2d 1019, cert den 425 US 940, 48 L Ed 2d 182, 96 S Ct 1676; *Vinci v United States*, 81 App DC 386, 159 F2d 777; *Allen v State*, 290 Ala 339, 276 So 2d 583; *Hinkle v State*, 50 Ala App 215, 278 So 2d 218; *People v Maes*, 43 Colo App 426, 607 P2d 1028; *Dyas v United States (Dist Col App)* 376 A2d 827, cert den 434 US 973, 54 L Ed 2d 464, 98 S Ct 529.

It could not be reasonably said that the action of the trial judge in dropping a pencil in surprise at a juror's response during the initial jury poll deprived the defendants of a fair trial, where there was no evidence that the jurors even noticed that the judge dropped his pencil, and the jury continued deliberations for 2 more days after the pencil-dropping incident. Such a lengthy period of deliberations after the incident indicates the verdict was a result of intense consideration rather than of coercion. *Commonwealth v Porter*, 300 Pa Super 260, 446 A2d 605.

Annotations: Gestures or facial expressions of trial judge in criminal case, indicating approval or disapproval, belief or disbelief, as ground for relief, 49 ALR3d 1186 § 3.

20. *Bellamy v State*, 56 Fla 43, 47 So 868.

Annotations: 49 ALR3d 1186 § 3.

21. *People v Franklin (2nd Dist)* 56 Cal App 3d 18, 128 Cal Rptr 94; *People v Walker (4th Dist)* 150 Cal App 2d 594, 310 P2d 110; *State v O'Connor*, 42 NJ 502, 201 A2d 705, cert den 379 US 916, 13 L Ed 2d 187, 85 S Ct 268; *State v Johnson*, 159 NJ Super 26, 386 A2d 1339.

Annotations: 49 ALR3d 1186 § 3.

22. *Allen v State*, 290 Ala 339, 276 So 2d 583; *State v Larmond (Iowa)* 244 NW2d 233; *State v Brooks (La App 3d Cir)* 499 So 2d 741, later app (La App 3d Cir) 520 So 2d 931; *Veal v State*, 196 Tenn 443, 268 SW2d 345.

Annotations: 49 ALR3d 1186 § 4.

23. *Butler v United States*, 88 App DC 140, 188 F2d 24.

Annotations: Gestures or facial expressions of trial judge in criminal case, indicating approval or disapproval, belief or disbelief, as ground for relief, 49 ALR3d 1186 § 4.

24. *People v Maes*, 43 Colo App 426, 607 P2d 1028; *State v Larmond (Iowa)* 244 NW2d 233; *State v Grant (La)* 295 So 2d 168; *State v Barron (Mo)* 465 SW2d 523, 49 ALR3d 1176; *Hearn v State (Tex Crim)* 411 SW2d 543.

error is for counsel to state at the time and on the record, outside the hearing of the jury, what took place, and if the trial judge does not believe the representations to be accurate, he may so state.²⁵ Before predicating reversible error upon the trial judge's allegedly prejudicial gestures, facial expressions, or hand movements, the reviewing court requires a detailed description in the record of such actions, and the points during the trial at which they occurred.²⁶

b. DISPARAGING ACCUSED [§§ 291-298]

§ 291. Generally

It is improper for a trial judge to make remarks calculated to discredit the accused as a witness,²⁷ such as to refer to the defendant in a criminal prosecution as a criminal,²⁸ or in the presence of members of the jury to state that a party presenting an affidavit is guilty of perjury.²⁹

§ 292. Commenting on accused's failure to testify

The Fifth Amendment to the United States Constitution, in its direct application to the Federal Government and its bearing on the states by reason of the Fourteenth Amendment, forbids comment by the trial judge on the accused's silence.³⁰ A defendant's right to complain of an error consisting of a

The appellant's claim that the trial judge, by gestures and facial expressions, indicated his disbelief of the testimony of the defendant and other defense witnesses, so as to unduly prejudice the jury against the defendant was frivolous where defense counsel made no objection at trial to any allegedly prejudicial action of the trial judge, and detailed no such conduct to the reviewing court. *United States v Ehrlichman*, 178 App DC 144, 546 F2d 910, 39 ALR Fed 604, cert den 429 US 1120, 51 L Ed 2d 570, 97 S Ct 1155.

Annotations: 49 ALR3d 1186 § 5(a).

25. *Billeci v United States*, 87 App DC 274, 184 F2d 394, 24 ALR2d 881.

Annotations: Gestures or facial expressions of trial judge in criminal case, indicating approval or disapproval, belief or disbelief, as ground for relief, 49 ALR3d 1186 § 5(b).

26. *Allen v State*, 290 Ala 339, 276 So 2d 583; *Milhouse v State*, 254 Ga 357, 329 SE2d 490; *Petro v State*, 270 Ind 86, 383 NE2d 323; *State v Larmond* (Iowa) 244 NW2d 233.

27. *United States v Anton* (CA3 Pa) 597 F2d 371, 59 ALR Fed 505; *People v McElheny*, 206 Mich 51, 172 NW 546; *State v Whitted*, 38 NC App 603, 248 SE2d 442.

The trial court prejudiced the defendant by implying before the jury that the defendant was fabricating his language barrier. A trial judge should not express his personal opinion concerning the credibility of a defendant's testimony. *Commonwealth v Pana*, 469 Pa 43, 364 A2d 895.

As to remarks by the trial judge disparaging the defense or the subject matter or importance of the litigation, see § 282.

As to the trial judge's disparaging remarks to witnesses, see §§ 314, 315.

Forms: Motion—For mistrial—Misconduct of judge; Remarks and conduct indicating disbelief of defense. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:859.

28. *Fuller v State*, 85 Miss 199, 37 So 749.

29. *Bowman v State*, 19 Neb 523, 28 NW 1.

As to the trial judge's reference to perjury by a witness, see § 301.

Annotations: Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused, 34 ALR3d 1313 §§ 16, 17[a].

30. *Griffin v California*, 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229, 5 Ohio Misc 127, 32 Ohio Ops 2d 437, reh den 381 US 957, 14 L Ed 2d 730, 85 S Ct 1797 and (diverged from on other grounds by *Chapman v California*, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, reh den 386 US 987, 18 L Ed 2d 241, 87 S Ct 1283) as stated in *State v Thompson*, 33 Ohio St 3d 1, 514 NE2d 407, later app (Ohio App, Licking Co) 1988 Ohio App LEXIS 4834.

The trial judge's explanation, in his introductory instructions, that "a witness is anyone who testifies, including the defendant," did not amount to an improper comment on the defendant's failure to testify. *United States v Alderete* (CA10 NM) 614 F2d 726.

As to comment by prosecutor or counsel for

violation of the Griffin Rule may be precluded if the error was invited or provoked by the defendant himself or by the defendant's attorney.³¹

§ 293. Stating that state's testimony was uncontradicted

Many cases support the conclusion that if the prosecution evidence characterized by the trial judge as uncontradicted or not denied is such that only the defendant himself could or would contradict it, an improper reference to the defendant's failure to testify is shown.³² On the other hand, there is considerable authority indicating that a bare statement by the trial judge that the prosecution's evidence, or some designated part of it, is uncontradicted, does not per se involve an impermissible reference to the defendant's failure to testify.³³ A fortiori, where it appears that the prosecution testimony described

codefendant on accused's failure to testify, see §§ 577 et seq.

As to preservation of error where violation of Griffin Rule alleged, see § 308.

As to effect of violation of Griffin Rule, see § 320.

As to jury instructions regarding the accused's right to remain silent, see §§ 1309 et seq.

31. *United States ex rel. Lewis v Yeager* (DC NJ) 285 F Supp 780, affd (CA3 NJ) 411 F2d 414, cert den 396 US 923, 24 L Ed 2d 204, 90 S Ct 256 and revd on other grounds (CA3 NJ) 438 F2d 814, cert den 402 US 961, 29 L Ed 2d 124, 91 S Ct 1622; *State v Fioravanti*, 46 NJ 109, 215 A2d 16, cert den 384 US 919, 16 L Ed 2d 440, 86 S Ct 1365.

Annotations: Violation of federal constitutional rule (Griffin v California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 ALR3d 1093 (§ 10 superseded by Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases, 32 ALR4th 774) § 11[a].

32. *Raper v Mintzes* (CA6 Mich) 706 F2d 161; *United States v Buege* (CA7 Wis) 578 F2d 187, cert den 439 US 871, 58 L Ed 2d 183, 99 S Ct 203; *United States v Goldman* (CA1 RI) 563 F2d 501, cert den 434 US 1067, 55 L Ed 2d 768, 98 S Ct 1245; *United States v Fearn* (CA7 Ill) 501 F2d 486; *United States v Medina* (CA1 Puerto Rico) 455 F2d 209; *United States v Flannery* (CA1 NH) 451 F2d 880 (disapproved on other grounds by *United States v Hasting*, 461 US 499, 76 L Ed 2d 96, 103 S Ct 1974, on remand (CA7 Ill) 739 F2d 1269, cert den 469 US 1218, 84 L Ed 2d 343, 105 S Ct 1199, 105 S Ct 1200); *United States v Handman* (CA7 Ill) 447 F2d 853; *Tanner v United States* (CA8 Mo) 401 F2d 281, cert den 393 US 1109, 21 L Ed 2d 806, 89 S Ct 922; *Linden v United States* (CA3 NJ) 296 F 104; *Robinson v State* (Ala App) 352 So 2d 11, cert den (Ala)

392 So 2d 15; *State v Still*, 119 Ariz 549, 582 P2d 639; *People v Medina* (2nd Dist) 41 Cal App 3d 438, 116 Cal Rptr 133; *White v United States* (Dist Col App) 248 A2d 825; *People v Tate* (3d Dist) 156 Ill App 3d 950, 109 Ill Dec 140, 509 NE2d 801; *Rowley v State*, 259 Ind 209, 285 NE2d 646; *State v Latin* (La) 412 So 2d 1357; *People v Centers*, 141 Mich App 364, 367 NW2d 397 and vacated, in part on other grounds 422 Mich 951, 377 NW2d 4 and (disagreed with on other grounds by *People v Guenther* (Mich App) 1991 Mich App LEXIS 114); *State v Morgan* (Mo) 444 SW2d 490; *State v Hart*, 154 Mont 310, 462 P2d 885; *State v Dymond*, 110 NH 228, 265 A2d 9; *State v Sinclair*, 49 NJ 525, 231 A2d 565, later app 57 NJ 39, 269 A2d 153; *People v Yore* (1st Dept) 36 App Div 2d 818, 320 NYS2d 601; *Angel v State* (Tex Crim) 627 SW2d 424; *Dubose v State* (Tex Crim) 531 SW2d 330; *State v Shattuck*, 141 Vt 523, 450 A2d 1122; *State v Bennett* (W Va) 304 SE2d 35.

As to a comment by the trial judge in his charge that the state's testimony was uncontradicted, see § 1313.

As to a comment by counsel that the state's testimony was uncontradicted, see § 580.

Annotations: Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 ALR3d 723 § 4.

33. *United States v Bright* (CA5 Miss) 630 F2d 804, 6 Fed Rules Evid Serv 550 (disapproved on other grounds by *Sedima, S.P.R.L. v Imrex Co.*, 473 US 479, 87 L Ed 2d 346, 105 S Ct 3275, CCH Fed Secur L Rep ¶ 92086, 1985-2 CCH Trade Cases ¶ 66666) as stated in *United States v Grayson* (CA3 Pa) 795 F2d 278, cert den 479 US 1054, 93 L Ed 2d 978, 107 S Ct 927; *United States v Palacios* (CA5 Tex) 612 F2d 972; *United States v Rochan* (CA5 Tex) 563 F2d 1246; *United States v Rodriguez* (CA2 NY) 556 F2d 638, cert den 434 US 1062, 55 L Ed 2d 762, 98 S Ct 1233; *United States v Estrada De Castillo* (CA9 Ariz)

as uncontradicted could be denied by a person or persons other than the defendant himself, no improper allusions to the accused's failure to take the stand is established.³⁴ The fact that the court's statement is true and accurate also supports the conclusion that a particular statement by the trial judge that the prosecution evidence is uncontradicted does not constitute an improper reference to such failure.³⁵

§ 294. Expressing opinion as to accused's guilt

In a criminal case the court should not, directly or indirectly, assume the guilt of the accused, or employ equivocal phrases which may leave such an impression.³⁶ However, such remarks may be held not prejudicial if made

549 F2d 583; *United States v Fabio* (CA4 Md) 394 F2d 132 (superseded by statute on other grounds as stated in *United States v Werner* (CA4 W Va) 916 F2d 175, 17 FR Serv 3d 1209); *Holden v United States* (CA1 Mass) 393 F2d 276; *Ex parte Dobard* (Ala) 435 So 2d 1351, cert den 464 US 1063, 79 L Ed 2d 203, 104 S Ct 745, later proceeding (Ala App) 455 So 2d 281; *State v Arredondo*, 111 Ariz 141, 526 P2d 163; *Harris v State*, 260 Ark 646, 543 SW2d 459; *People v Sanchez*, 184 Colo 25, 518 P2d 818; *Jones v State*, 168 Ga App 652, 310 SE2d 17; *State v Hodges*, 105 Idaho 588, 671 P2d 1051; *People v Bryant*, 94 Ill 2d 514, 69 Ill Dec 84, 447 NE2d 301; *Flynn v State* (Ind) 497 NE2d 912; *Meyer v Commonwealth* (Ky) 472 SW2d 479, cert den 406 US 919, 32 L Ed 2d 118, 92 S Ct 1771 and (ovrld on other grounds by *Short v Commonwealth* (Ky) 519 SW2d 828); *State v Henderson* (La) 352 So 2d 206; *State v Inman* (Me) 350 A2d 582; *Brown v State*, 64 Md App 324, 494 A2d 999, cert den 304 Md 296, 498 A2d 1183; *Commonwealth v Borodine*, 371 Mass 1, 353 NE2d 649, cert den 429 US 1049, 50 L Ed 2d 765, 97 S Ct 760; *People v Rodriguez*, 83 Mich App 606, 269 NW2d 199; *State v Yurkiewicz*, 212 Minn 208, 3 NW2d 775; *Lee v State* (Miss) 435 So 2d 674; *State v Jones* (Mo) 491 SW2d 271; *State v Botts*, 184 Neb 78, 165 NW2d 358; *State v Aguirre*, 84 NM 376, 503 P2d 1154; *People v Scott* (2d Dept) 138 App Div 2d 421, 525 NYS2d 703, app den 72 NY2d 866, 532 NYS2d 516, 528 NE2d 906; *State v Williams*, 305 NC 656, 292 SE2d 243, cert den 459 US 1056, 74 L Ed 2d 622, 103 S Ct 474, reh den 459 US 1189, 74 L Ed 2d 1031, 103 S Ct 839; *State v Wade*, 53 Ohio St 2d 182, 7 Ohio Ops 3d 362, 373 NE2d 1244, vacated, in part on other grounds 438 US 911, 57 L Ed 2d 1157, 98 S Ct 3138; *Lavicky v State* (Okla Crim) 632 P2d 1234; *Commonwealth v Rolan*, 520 Pa 1, 549 A2d 553; *State v Rouse*, 262 SC 581, 206 SE2d 873; *State v Rice* (Tenn Crim) 638 SW2d 424; *Edmond v State* (Tex Crim) 566 SW2d 609; *State v Crawford*, 21 Wash App 146, 584 P2d 442, review den 91 Wash 2d 1013; *State v Bogard* (W Va) 312 SE2d 782; *Deeter v State* (Wyo) 500 P2d 68.

Annotations: 14 ALR3d 723 § 10.

34. *Kurina v Thieret* (CA7 Ill) 853 F2d 1409, cert den 489 US 1085, 103 L Ed 2d 848, 109 S Ct 1544; *United States v Giuliano* (CA3 NJ) 383 F2d 30, cert den 389 US 1055, 19 L Ed 2d 852, 88 S Ct 805; *Morrison v United States* (CA8 Okla) 6 F2d 809; *Shea v United States* (CA6 Ohio) 251 F 440, cert den 248 US 581, 63 L Ed 431, 39 S Ct 132; *People v Erickson* (4th Dist) 254 Cal App 2d 395, 62 Cal Rptr 108; *State v Evans*, 165 Conn 61, 327 A2d 576 (diverged from on other grounds by *State v Golding*, 213 Conn 233, 567 A2d 823) as stated in *Bunkley v Warden* (Conn Super) 1990 Conn Super LEXIS 383; *State v Padilla*, 57 Hawaii 150, 552 P2d 357; *People v Mills*, 40 Ill 2d 4, 237 NE2d 697; *State v Johnson*, 219 Kan 847, 549 P2d 1370; *State v Jackson* (La) 454 So 2d 116; *State v Hampton* (Mo) 430 SW2d 160; *State v Hernandez* (App) 104 NM 97, 717 P2d 73, later proceeding 103 NM 798, 715 P2d 71; *Pugh v State* (Okla Crim) 528 P2d 719; *Commonwealth v Kloch*, 230 Pa Super 563, 327 A2d 375; *State v Ashby*, 77 Wash 2d 33, 459 P2d 403.

Annotations: 14 ALR3d 723 § 8.

35. *Davis v United States* (CA4 NC) 279 F2d 127, cert den 364 US 822, 5 L Ed 2d 53, 81 S Ct 60; *Whitt v State* (Ala App) 370 So 2d 730, revd on other grounds (Ala) 370 So 2d 736, on remand (Ala App) 370 So 2d 740; *People v Keagle*, 7 Ill 2d 408, 131 NE2d 74, cert den 351 US 942, 100 L Ed 1468, 76 S Ct 842; *People v Poree* (1st Dist) 119 Ill App 3d 590, 75 Ill Dec 129, 456 NE2d 950; *People v Ganter* (1st Dist) 56 Ill App 3d 316, 14 Ill Dec 19, 371 NE2d 1072; *Foster v Commonwealth* (Ky) 415 SW2d 373, cert den 388 US 914, 18 L Ed 2d 1355, 87 S Ct 2128; *State v Quillun* (Mo App) 570 SW2d 767; *Moss v State*, 88 Nev 19, 492 P2d 1307; *State v Nachtigall* (SD) 296 NW2d 530; *Miller v Commonwealth*, 153 Va 890, 149 SE 459, 68 ALR 1102.

Annotations: 14 ALR3d 723 § 13.

36. *Sharp v State*, 51 Ark 147, 10 SW 228; *People v Brock*, 66 Cal 2d 645, 58 Cal Rptr 321, 426 P2d 889 (ovrld on other grounds by

outside of the hearing of the jury;³⁷ and in some jurisdictions it has been held that the trial judge may comment on the guilt of the accused, provided that this right is exercised fairly and temperately, that there is reasonable ground for any statement that the judge may make, and that he clearly leaves to the jury the right to decide all the facts and every question in the case regardless of his opinion.³⁸

§ 295. —In federal court

In federal court, statements by the trial judge expressing a belief that the accused is guilty of the crime charged are improper,³⁹ prejudicial,⁴⁰ and incapable of being cured by other instructions or remarks.⁴¹ Such remarks have been held especially improper⁴² and especially prejudicial⁴³ where the judge has made them after the jurors have indicated their inability to agree on a verdict.

It should be noted, however, that the fact that the evidence of the accused's guilt is virtually undisputed has been considered by the federal courts an exceptional circumstance under which either the trial judge may properly express his opinion that the accused is guilty,⁴⁴ or the expression of such an

People v Cook, 33 Cal 3d 400, 189 Cal Rptr 159, 658 P2d 86; *State v Mancino*, 257 Minn 580, 102 NW2d 504.

A remark by the judge that he does not propose to have the case again reversed on appeal does not show such an expectation of a conviction as to amount to error. *People v Keith*, 141 Cal 686, 75 P 304.

A statement that the Supreme Court would again be permitted to rule on a certain case is not likely to suggest to a jury that the court believes the defendant guilty or that he should be convicted. *State v Buschman*, 325 Mo 553, 29 SW2d 688, 70 ALR 904 (not followed on other grounds by *State v O'Toole* (Mo App) 520 SW2d 177).

The trial court's remarks, uttered when the defense counsel left a knife on a table within easy grasp of the defendant, to "step over here with the knife, don't leave that there. Look, I don't want that exhibit left anywhere where this man can get to it," were of such a nature as to reasonably tend to prejudice the minds of the jury against the defendant and to deny him a fair and impartial trial. *State v Wendel* (Mo App) 532 SW2d 838.

Generally, as to the exercise of the power to charge on the facts and the weight of the evidence, see § 1198.

37. *Clenney v State*, 229 Ga 561, 192 SE2d 907.

38. *Commonwealth v Ott*, 417 Pa 269, 207 A2d 874.

39. *United States v Murdock*, 290 US 389, 78 L Ed 381, 54 S Ct 223, 3 USTC ¶1194, 13 AFTR 821 (ovrld on other grounds by *Murphy*

v Waterfront Com. of New York Harbor, 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594, 56 BNA LRRM 2544, 49 CCH LC ¶51102, motion den 379 US 898, 13 L Ed 2d 174, 85 S Ct 183) as stated in *People v Smith* (3d Dist) 102 Ill App 3d 226, 57 Ill Dec 753, 429 NE2d 870; *Horning v District of Columbia*, 254 US 135, 65 L Ed 185, 41 S Ct 53.

Annotations: Propriety and prejudicial effect of federal judge's expressing to jury his opinion as to defendant's guilt in criminal case, 7 ALR Fed 377 § 3.

40. *United States v Diharce-Estrada* (CA5 Tex) 526 F2d 637, 41 ALR Fed 1; *Gant v United States* (CA8 Mo) 506 F2d 518, cert den 420 US 1005, 43 L Ed 2d 764, 95 S Ct 1449; *United States v Smith* (CA6 Ky) 399 F2d 896, 7 ALR Fed 370; *McBride v United States* (CA10 Okla) 314 F2d 75.

Annotations: 7 ALR Fed 377 § 6[a].

41. *United States v Woods* (CA2 NY) 252 F2d 334; *Davis v United States* (CA10 Okla) 227 F2d 568.

Annotations: 7 ALR Fed 377 § 8.

42. *Lewis v United States* (CA8 Okla) 8 F2d 849.

Annotations: 7 ALR Fed 377 § 5[c].

43. *Garst v United States* (CA4 Va) 180 F 339.

Annotations: 7 ALR Fed 377 § 6[b].

44. *Horning v District of Columbia*, 254 US 135, 65 L Ed 185, 41 S Ct 53; *Gant v United States* (CA8 Mo) 506 F2d 518, cert den 420 US 1005, 43 L Ed 2d 764, 95 S Ct 1449.

Annotations: 7 ALR Fed 377 § 4[b].

opinion, even if improper, is not prejudicial.⁴⁵ The courts recognizing the propriety of such remarks under this exceptional circumstance have held such remarks improper⁴⁶ and prejudicial⁴⁷ where there is any substantial dispute in the evidence of the accused's guilt.

Another frequently recognized exceptional circumstance in the federal courts is the trial judge's accompanying his expression of opinion that the defendant is guilty with an instruction to the jurors that they are not bound by his opinions, but must exercise their independent judgment. Some federal courts hold that it is not improper in this situation to make such remarks,⁴⁸ or that even if it is improper, it is not prejudicial.⁴⁹ However, in some cases in which the judge gave the instruction that the jury was not bound by his opinion, the trial judge's expression of opinion that the defendant was guilty was held improper⁵⁰ and prejudicial.⁵¹

§ 296. Commenting on accused's willingness to submit to lie detector test

A trial court's comment on a defendant's failure to take a polygraph examination is harmless beyond a reasonable doubt where the judge also informs the jury that the defendant cannot be compelled to take a polygraph test, that the results of such tests are of questionable reliability, and that the jury is the lie detector, not the polygraph.⁵²

Where the trial judge, sitting without a jury, makes remarks relating to an expressed willingness on the part of the defendant to take a lie detector test, but such remarks are made in response to a statement by counsel for the defendant, where the report of the results of the test is not filed, and the judge remains unaffected by the report, the court on appeal will not interfere with his opinion.⁵³

45. *Horning v District of Columbia*, 254 US 135, 65 L Ed 185, 41 S Ct 53.

Annotations: 7 ALR Fed 377 § 6[d].

46. *United States v Murdock*, 290 US 389, 78 L Ed 381, 54 S Ct 223, 3 USTC ¶ 1194, 13 AFTR 821 (ovrld on other grounds by *Murphy v Waterfront Com. of New York Harbor*, 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594, 56 BNA LRRM 2544, 49 CCH LC ¶ 51102, motion den 379 US 898, 13 L Ed 2d 174, 85 S Ct 183) as stated in *People v Smith* (3d Dist) 102 Ill App 3d 226, 57 Ill Dec 753, 429 NE2d 870; *United States v Smith* (CA6 Ky) 399 F2d 896, 7 ALR Fed 370.

Annotations: 7 ALR Fed 377 § 5[b].

47. *United States v Smith* (CA6 Ky) 399 F2d 896, 7 ALR Fed 370.

Annotations: 7 ALR Fed 377 § 6.

48. *United States v Onori* (CA5 Fla) 535 F2d 938; *Northcraft v United States* (CA8 Mo) 271 F2d 184.

Annotations: 7 ALR Fed 377 § 4[a].

49. *Vecchio v United States* (CA8 Neb) 53 F2d 628.

The judge's comments regarding the defen-

dant's guilt were far less significant because they were made after the verdict had been announced, although before the polling of the individual jurors, than had they been made prior to the jury deliberations. *United States v Shepherd* (CA7 Ind) 576 F2d 719, cert den 439 US 852, 58 L Ed 2d 155, 99 S Ct 158.

Annotations: 7 ALR Fed 377 § 6[c].

50. *United States v Link* (CA3 NJ) 202 F2d 592, 53-1 USTC ¶ 9230, 43 AFTR 424; *Malaga v United States* (CA1 Mass) 57 F2d 822.

Annotations: 7 ALR Fed 377 § 5[a].

51. *United States v Smith* (CA6 Ky) 399 F2d 896, 7 ALR Fed 370.

Annotations: 7 ALR Fed 377 §§ 6, 8.

52. *Commonwealth v Burden*, 15 Mass App 666, 448 NE2d 387, app den 389 Mass 1102, 451 NE2d 1166.

53. *People v Barton* (2nd Dist) 172 Cal App 2d 474, 341 P2d 709.

As to comments by counsel or prosecution on the willingness of the accused to submit to a lie detector test, see §§ 526, 630.

Generally, as to trial by the court, see §§ 1956 et seq.

§ 297. Holding accused in contempt in presence of jury

Although, generally speaking, citing him for contempt is a constitutionally permissible way of punishing a contumacious defendant in a criminal case,⁵⁴ as to the question of the prejudicial effect of holding an accused in contempt of court in the presence of the jury, the cases have been decided largely on the basis of their particular facts, establishing no definite, hard-and-fast rules. A trial judge's holding an accused in contempt of court in the jury's presence has been regarded as reversible error where the finding of contempt was deemed unjustified, the question of the defendant's guilt being a close one.⁵⁵

Although pointing out that the trial judge must have wide discretion in preserving courtroom decorum, and that the better practice is to call a recess and take up the matter in chambers, other cases have held that the particular circumstances involved did not make the judge's holding the accused in contempt of court in the presence of the jury prejudicial error.⁵⁶ For example, the act of the trial court of holding the defendant in contempt in the presence of the jury for refusing to answer a question propounded by his own counsel, with no forewarning to the defendant and with no instructions to the jury to draw no unfavorable inferences, did not constitute prejudicial error where there was other substantial evidence casting doubt on the defendant's credibility, and where the defendant offered nothing to substantiate his claim that the contempt citation was harmful to him other than the bare statement that it had to be.⁵⁷

§ 298. Comments regarding military service

Whether comment by a trial judge as to the military service of an accused is improper or prejudicial depends upon the circumstances of the particular case. On the one hand, comment by a court after the admission of evidence that the defendant, accused of rape, was honorably discharged from the Army, that the certificate, although an honorable thing to have, did not give a license to anyone to return and debauch a child or enter a home for the purpose of destroying it, was prejudicial.⁵⁸ On the other hand, a remark by a trial judge that bringing in the past Army or Navy record was not a proper way for the defendant to try his case, the issue not being his general history, did not

As to the admissibility of physiological or psychological tests of truth or deception, see 29 Am Jur 2d, Evidence §§ 831, 831.5.

As to the use of physiological or psychological tests of truth or deception where the test is taken upon stipulation as to the admissibility of results, see 29 Am Jur 2d, Evidence § 831.5.

Annotations: Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test, 95 ALR2d 819 § 11.

54. *Illinois v Allen*, 397 US 337, 25 L Ed 2d 353, 90 S Ct 1057, 51 Ohio Ops 2d 163, reh den 398 US 915, 26 L Ed 2d 80, 90 S Ct 1684.

55. *People v Cole*, 113 Cal App 2d 253, 248 P2d 141.

Annotations: Prejudicial effect of holding

accused in contempt of court in presence of jury, 29 ALR3d 1399.

56. *Preston v Commonwealth (Ky)* 406 SW2d 398, 29 ALR3d 1387, cert den 386 US 920, 17 L Ed 2d 792, 87 S Ct 886; *State v Bleeckfield*, 115 NJL 76, 178 A 561, affd 115 NJL 559, 181 A 168; *State v Middleton*, 46 Or App 381, 611 P2d 698.

Annotations: 29 ALR3d 1399.

57. *State v McClain*, 171 Conn 293, 370 A2d 928.

As to contempt, generally, see 17 Am Jur 2d, Contempt.

58. *State v Dolliver*, 150 Minn 155, 184 NW 848.

Annotations: Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 ALR2d 606 § 9.

warrant a mistrial;⁵⁹ and a remark by the trial judge that it would have been better had the defendant not mentioned that he was an ex-soldier for the very good reason that he would not want to reflect on the reputation of good soldiers, was not prejudicial and did not warrant a finding that the defendant did not have a fair trial.⁶⁰

C. REMARKS TO OR RESPECTING WITNESSES [§§ 299-301]

§ 299. Generally

Whether judicial admonitions to defense or prosecution witnesses violate a defendant's right to due process depends ultimately on the facts in each case. Such admonitions should be administered, if at all, judiciously and cautiously.⁶¹ While a trial judge should not in jury cases indicate either favor or disfavor toward witnesses,⁶² it may often happen in the course of a trial that some occurrence will warrant comment by the court on the conduct of a witness. Such comment when within reasonable bounds and appropriate to the character of the occurrence does not amount to legal error which is the foundation of an exception.⁶³ Thus, a court may caution a witness to pay attention to the questions and answer so as to be heard,⁶⁴ not to become excited, and to think over what he is about to say,⁶⁵ or to answer questions frankly.⁶⁶ So also, a court may restrain a voluble witness.⁶⁷ In the interest of an orderly trial, a trial court may in proper cases reprove or rebuke witnesses,⁶⁸ and a mere admonition to a witness is not ordinarily prejudicial.⁶⁹ It is not improper for a trial court on its own motion to inform a witness of his rights. The trial court should not,

59. *Cohen v State*, 173 Md 216, 195 A 532, reh overr 173 Md 233, 196 A 819 and cert den 303 US 660, 82 L Ed 1119, 58 S Ct 764.

Annotations: 9 ALR2d 606 § 9.

60. *State v Greer*, 163 Kan 592, 184 P2d 991.

As to comments during argument by counsel or a prosecuting attorney as to a party's or accused's lack or evasion of military service, see § 657.

Annotations: 9 ALR2d 606 § 9.

61. *State v Melvin*, 326 NC 173, 388 SE2d 72.

62. *People v Giacomino*, 347 Ill 523, 180 NE 437, 84 ALR 1168; *Cohen v Bridges*, 255 Wis 535, 39 NW2d 373.

It is improper for a trial judge to advise a prosecuting attorney that he may not address the defendant as "Mr.," since when a defendant takes the stand he is a witness and is entitled to the same form of address, and the same courtesies and consideration, as all others involved in the proceeding. *Armstead v United States*, 121 App DC 22, 347 F2d 806.

A friendly conversation between a judge and a witness for the prosecution is not ground for reversal unless the facts are such that prejudice to the accused may be presumed. *State v Boudreau*, 156 Wash 103, 286 P 51, 68 ALR 1035.

As to remarks by the trial judge disparaging the defense or the subject matter or the importance of the litigation, see §§ 282, 283.

As to the trial judge's remarks disparaging civil litigants, see § 310.

As to the trial judge's remarks disparaging the accused during trial, see § 291.

63. *People v Cole*, 349 Mich 175, 84 NW2d 711; *State v Schneider*, 158 Wash 504, 291 P 1093, 72 ALR 571; *Cohen v Bridges*, 255 Wis 535, 39 NW2d 373; *Kendrick v Healy*, 27 Wyo 123, 192 P 601.

64. *Kendrick v Healy*, 27 Wyo 123, 192 P 601.

65. *Kearney v State*, 101 Ga 803, 29 SE 127.

66. *Bullock v Sklar* (Mo App) 349 SW2d 381, 90 ALR2d 318; *Wendelboe v Jacobson*, 10 Utah 2d 344, 353 P2d 178.

67. *Long v State*, 118 Ga 319, 45 SE 416.

68. *Patterson v State*, 191 Ala 16, 67 So 997; *Frankfort v Coleman*, 19 Ind App 368, 49 NE 474; *State v Carpenter*, 124 Iowa 5, 98 NW 775.

69. *Grant v State*, 67 Tex Crim 155, 148 SW 760.

As to an admonition to a witness as a ground for a new trial, see 58 Am Jur 2d, New Trial § 155.

however, go beyond that point and advise a witness with regard to whether and how he should testify.⁷⁰

A statement that a witness is an unwilling one, made in response to an objection to leading questions propounded by the counsel who called the witness, is a necessary comment which is not objectionable,⁷¹ but where a witness hesitates in answering involved questions on cross-examination, it is error for the judge to remark that she answered questions promptly on her examination in chief.⁷² While it has been held that it is not error to direct an accused testifying for himself to answer questions,⁷³ or to state that if he were not already in jail he would be sent there for contempt,⁷⁴ this cannot be said of remarks calculated to discredit the accused as a witness,⁷⁵ to indicate that in the judge's opinion he is guilty,⁷⁶ or that the court has prejudged the case. A remark that it is not permissible to manufacture evidence in the case, being uncalled for, is improper.⁷⁷ On the other hand, asking a leading question is not a comment on the facts,⁷⁸ and a remark that evidence is received for "what it is worth" is not prejudicial.⁷⁹

§ 300. Commenting on witness' credibility

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility.⁸⁰ The trial court may not make comments, insinuations, or suggestions indicative of belief or disbelief in the integrity or credibility of witnesses.⁸¹

Remarks by the court to counsel concerning the alleged perjured character of particular testimony, which are so pronounced and extensive as to divert the attention of the jury from the true issues, or create or give undue

70. *State v Mendez*, 42 NC App 141, 256 SE2d 405.

71. *State v Ross*, 55 Or 450, 104 P 596, mod 55 Or 474, 106 P 1022 and error dismd 227 US 150, 57 L Ed 458, 33 S Ct 220.

72. *Schmidt v St. Louis R. Co.*, 149 Mo 269, 50 SW 921.

73. *Wilder v People*, 86 Colo 35, 278 P 594, 65 ALR 1260.

However, it was fatal error for the court to tell the defendant to answer the questions and "not be dodging," and this notwithstanding an admonition that the jury should not consider the word "dodging." *State v Rogers*, 173 NC 755, 91 SE 854.

74. *State v Hogg*, 126 La 1053, 53 So 225.

75. § 291.

76. § 394.

77. *Foster v Shepherd*, 258 Ill 164, 101 NE 411 (ovrld on other grounds by *Spiegel's House Furnishing Co. v Industrial Com.*, 288 Ill 422, 123 NE 606, 6 ALR 540).

78. *State v Fuller*, 34 Mont 12, 85 P 369; *Patrick v Smith*, 75 Wash 407, 134 P 1076.

79. *People v Acardo*, 140 App Div 929, 125 NYS 502.

80. *State v Artis*, 325 NC 278, 384 SE2d 470, vacated on other grounds (US) 108 L Ed 2d 604, 110 S Ct 1466, on remand 327 NC 470, 397 SE2d 223.

81. *Smith v Ohio Oil Co.* (4th Dist) 10 Ill App 2d 67, 134 NE2d 526, 58 ALR2d 680; *Commonwealth v Brown*, 309 Pa 515, 164 A 726, 86 ALR 892; *Heitfeld v Benevolent & Protective Order of Keglers*, 36 Wash 2d 685, 220 P2d 655, 18 ALR2d 983.

From the judge's shaking hands and conversing with the state's witness, the jury could most reasonably infer that he believed her to be a very credible, honest witness, and that this inadvertent conduct was prejudicial to the defendant, especially in view of the fact that this was the state's key witness. *Abrams v State* (Fla App D4) 326 So 2d 211, later app (Fla App D4) 350 So 2d 1104 (disagreed with on other grounds by *Taylor v State* (Fla App D1) 557 So 2d 138, 15 FLW 437).

Annotations: Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging the litigants, the witnesses, or the subject matter of the litigation, 83 ALR2d 1128 § 9[a].

Forms: Instruction—Remarks by court in making rulings not intended as comment on evidence or credibility. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 130.

prominence to other than the main issues of a cause, may result in a deprivation of the right freely to submit evidence to the unhampered consideration of the jury.⁸²

§ 301. —Warning of penalty for perjury

There is no per se violation of a defendant's right to present witnesses when a trial court judge advises prospective witnesses of the penalties for testifying falsely.⁸³

■■■■ Observation: To avoid injustice resulting from perjury, judges may, out of the jury's presence, judiciously warn a witness against it. The reviewing court should examine the circumstances under which a perjury or other similar admonition was made to a witness, the tenor of the warning given, and its likely effect on the witness' intended testimony. If the admonition likely precluded a witness from making a free and voluntary choice whether to testify, or changed the witness' testimony to coincide with the judge's view of the facts, then a defendant's right to due process may have been violated. On the other hand, a warning to a witness made judiciously under circumstances that reasonably indicate a need for it and which has the effect of merely preventing testimony that otherwise would likely have been perjured does not violate a defendant's right to due process. Defendants have no due process or other constitutional right to present perjured testimony.⁸⁴

The trial judge may make impersonal general remarks in a proper case as to the consequences of perjury.⁸⁵ The trial judge should not make any statements or comments in instructions or otherwise, intimating to the jury that a particular witness was guilty of perjury,⁸⁶ although in jurisdictions in which comment on the facts is permitted, he may in his charge express his opinion as to the veracity of a witness, so long as the jury is left free to use its own judgment.⁸⁷

Generally, the trial judge may not in the presence of the jury cause the arrest of a witness for perjury.⁸⁸

d. REMARKS TO OR RESPECTING ATTORNEYS [§§ 302-306]

§ 302. Generally

Although a trial judge should avoid verbal controversies with counsel in the presence of the jury and should not express or display personal attitudes of displeasure toward counsel, the general conduct of trial is the judge's responsibility and he may properly intervene to expedite matters and prevent unnecessary waste of time.⁸⁹ It is completely improper, however, for a judge to

82. *Kronmueller v Wipperman* (Mo App) 129 SW2d 43.

83. *State v Dumaine*, 162 Ariz 392, 783 P2d 1184, 47 Ariz Adv Rep 24; *Benton v State*, 58 Ga App 633, 199 SE 561.

84. *State v Melvin*, 326 NC 173, 388 SE2d 72.

85. *Dahlgren v Israel*, 204 Ill App (abstract) 340.

86. *Southeastern Greyhound Lines, Inc. v*

Groves, 175 Tenn 584, 136 SW2d 512, 127 ALR 1378.

87. § 1195.

88. § 225.

89. *Re Parkside Housing Project*, 290 Mich 582, 287 NW 571; *Food Source, Inc. v Zurich Ins. Co.* (Tex App Dallas) 751 SW2d 596, writ den.

Annotations: Prejudicial effect of remarks of

advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial. When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client.⁹⁰ Conversely, a trial judge may not compliment one attorney at the expense of the other or use language which tends to bring an attorney into contempt before the jury.⁹¹

The judge is under a duty not to impair counsel's effectiveness, either by intimidation or by discrediting his efforts in the jury's eyes.⁹² A defendant has a right to be represented by an attorney who is treated with the consideration due an officer of the court. Belittling observations aimed at defense counsel are necessarily injurious to the one he represents. Trial judges who berate, scold, and demean an attorney, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary for a fair hearing.⁹³

Although unfair criticism of defense counsel in front of the jury is always improper, reversal is necessary only where the court's conduct denied the defendant a fair and impartial trial by unduly influencing the jury,⁹⁴ and the question of whether such prejudicial trial court conduct reaches constitutional magnitude is a matter of degree.⁹⁵ Where the court directs critical remarks at counsel, such conduct should be viewed in the context of the entire trial.⁹⁶ Rebukes of an attorney within the presence of the jury are within the discretion of the trial court and do not warrant a reversal unless prejudice is shown. Prejudice may be presumed, however, if remarks were calculated to have a prejudicial effect.⁹⁷ Whether a jury heard the remarks of the judge criticizing counsel is an important consideration in determining their prejudicial effect.⁹⁸ Even without a jury, when a judge's criticism works to intimidate counsel and to repress his best efforts, there may be reversible error.⁹⁹

trial judge criticizing counsel in civil case, 94 ALR2d 826.

90. *People v Fatone* (4th Dist) 165 Cal App 3d 1164, 211 Cal Rptr 288.

The trial judge's repeated gibes at defense counsel held the latter up to scorn and ridicule and could not have failed to leave the jury with the impression that the plaintiff should prevail. Such conduct is subject to serious criticism and warrants a new trial. *Adams v Yellow Cab Corp.*, 12 Mass App 931, 425 NE2d 398.

91. *Rosenberg v District of Columbia* (Mun Ct App Dist Col) 66 A2d 489; *Florida Motor Lines Corp. v Barry*, 158 Fla 123, 27 So 2d 753; *Commonwealth v Brown*, 309 Pa 515, 164 A 726, 86 ALR 892.

92. *Atlantic Refining Co. v Jones* (CA4 W Va) 70 F2d 89; *Travelers Ins. Co. v Simon* (Tex Civ App) 126 SW2d 674.

93. *People v Ross*, 181 Mich App 89, 449 NW2d 107, app den 433 Mich 907.

A remark which appears to impute unethical conduct to a lawyer lowers the esteem of the lawyer before the jury and consequently prejudices the client's cause. *Seaboard C.L.R. Co. v Wiesenfeld Warehouse Co.* (Fla App D1) 316 So 2d 567, cert den (Fla) 328 So 2d 846.

94. *People v Ross*, 181 Mich App 89, 449 NW2d 107, app den 433 Mich 907.

A jury is not always vulnerable to every utterance by a judge. *Pilgeram v Haas*, 118 Mont 431, 167 P2d 339; *Empire Oil & Refining Co. v Fields*, 188 Okla 666, 112 P2d 395, app dismd 314 US 572, 86 L Ed 463, 62 S Ct 97.

95. *United States v Abrams* (CA5 Fla) 568 F2d 411, cert den 437 US 903, 57 L Ed 2d 1133, 98 S Ct 3089.

96. *State v Cokeley*, 159 W Va 664, 226 SE2d 40.

The trial court's reference to a criminal defense counsel's methods as "nonsense" taken in context, had an insignificant effect on the outcome of the trial. *United States v Calhoun* (CA9 Cal) 542 F2d 1094, cert den 429 US 1064, 50 L Ed 2d 781, 97 S Ct 792.

97. *State v Stamm*, 16 Wash App 603, 559 P2d 1, review den 91 Wash 2d 1013.

98. *Skelton v Beall* (Fla App D3) 133 So 2d 477, 94 ALR2d 820.

Annotations: 94 ALR2d 826 § 7[a].

99. *Metzenbaum v Metzenbaum*, 96 Cal App

■■■■ **Caution:** Statements which express impatience or hostility toward defense counsel do not amount to reversible error where they are either invited or provoked by such counsel.¹

§ 303. In respect of argument or trial strategy

Trials are adversary proceedings and the trial judge, although not merely a referee or moderator, should not hinder an applicant's strategy as long as the strategical method is within legal and ethical standards.²

While it is irregular for a court to call upon counsel in the presence of the jury to waive any legal right,³ it is not prejudicial error to ask counsel whether they desire to argue the case to the jury.⁴ It is the duty of the trial court to correct mistakes of law made by counsel in argument to the jury,⁵ and, on its own motion, to interrupt and admonish counsel when he exceeds the bounds of legitimate argument.⁶ The court may interrupt and correct the statement of a legal proposition, even though there is a requirement that instructions be reduced to writing.⁷ While the judge may tell counsel that his argument is contrary to the instructions to the jury,⁸ or that there is no right to use an argument, it is improper to add that any verdict for his client will be set aside,⁹ or, instead of requiring counsel in argument to keep within proper bounds, for the judge to take it upon himself to offer rebuttal testimony.¹⁰

In criminal cases, especially, in which the accused has a constitutional right to be heard by counsel,¹¹ the court may not contemptuously characterize the argument of the defendant's counsel, or instruct the jury to disregard it.¹² For

2d 197, 214 P2d 603; *Adler v Nelson*, 123 Misc 531, 205 NYS 336.

Annotations: 94 ALR2d 826 § 8.

1. *People v Beasley* (1st Dist) 54 Ill App 3d 109, 11 Ill Dec 806, 369 NE2d 260.

2. *Yetton v Henderson* (3d Dist) 190 Ill App 3d 973, 137 Ill Dec 887, 546 NE2d 1000, app den 131 Ill 2d 568, 142 Ill Dec 889, 553 NE2d 403.

The trial court's admonishment to all the attorneys involved to "stick to the evidence" did not reflect his opinion as to the veracity of defense counsel. *People v Veal* (1st Dist) 58 Ill App 3d 938, 16 Ill Dec 188, 374 NE2d 963, cert den 441 US 908, 60 L Ed 2d 378, 99 S Ct 2001, 99 S Ct 2002, reh den 441 US 957, 60 L Ed 2d 1061, 99 S Ct 2187.

3. § 273.

4. *State v Randall*, 170 NC 757, 87 SE 227.

5. *United States v Varlack* (CA2 NY) 225 F2d 665, 36 BNA LRRM 2639, 28 CCH LC ¶ 69426; *Frady v People*, 96 Colo 43, 40 P2d 606, 96 ALR 1052; *Linder v State*, 156 Neb 504, 56 NW2d 734; *Commonwealth v Britton*, 334 Pa Super 203, 482 A2d 1294, app dismd 509 Pa 620, 506 A2d 895.

As to instructions as to the argument of counsel, see § 1235.

Annotations: Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166 § 31[d].

6. § 713.

7. *Rogers v State*, 60 Ark 76, 29 SW 894.

Annotations: 62 ALR2d 166 § 31[d].

8. *Frady v People*, 96 Colo 43, 40 P2d 606, 96 ALR 1052.

Annotations: 62 ALR2d 166 § 31[d].

9. *Ballance v Dunnington*, 241 Mich 383, 217 NW 329, 57 ALR 262, later app 246 Mich 36, 224 NW 434.

Annotations: Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 ALR2d 826 § 35[a].

10. *Commonwealth v Brown*, 309 Pa 515, 164 A 726, 86 ALR 892.

Annotations: 62 ALR2d 166 § 31[b].

11. As to the judge's strictures as amounting to an abridgement of the right to counsel, see § 309.

12. *People v Riggins*, 8 Ill 2d 78, 132 NE2d 519, 56 ALR2d 1149, later app 13 Ill 2d 134, 148 NE2d 450; *Commonwealth v Brown*, 309 Pa 515, 164 A 726, 86 ALR 892.

example, the trial court's accusation, in the jury's presence, of deceit by appellant's counsel in presenting appellant's defense, was reasonably calculated to prejudice the jury against appellant, denying him his Sixth Amendment right to a fair trial by an impartial jury.¹³

Where the counsel for the defense deliberately baits the trial judge into making what would otherwise be a prejudicial remark, such remark will not be considered as prejudicial error.¹⁴

§ 304. In respect of examination of witnesses

It is not error for the trial judge to make statements and suggestions to counsel out of the hearing of the jury designed to avoid error in the presentation of the evidence.¹⁵ A judge may suggest the correct way to introduce admissible evidence.¹⁶ Similarly, the court's suggesting to counsel that had he objected to a particular question the objection would have been sustained does not constitute prejudicial error where such incident takes place out of the jury's presence.¹⁷ Defense counsel should not, however, be intimidated or discouraged from eliciting essential and relevant testimony on either direct or cross-examination.¹⁸

§ 305. Censure and punishment of counsel

Judges presiding over the trial of a case have a responsibility that exceeds that of merely ruling on motions and objections of the parties. Where appropriate, it is essential that they timely and appropriately require that attorneys adhere to the canons and standards of professional conduct. When counsel fails, the trial judge should mete out the punishment appropriate to the circumstances. Individual professional misconduct should not be punished at the citizens' expense, by reversal and mistrial, but should be redressed at the attorney's expense through professional sanction.¹⁹ It is within the province of the trial judge to admonish and rebuke counsel guilty of misconduct and to use other preventive measures necessary to maintain the dignity of the court,²⁰ provided it is done in a manner that does not subject counsel to

The trial judge committed reversible error by interrupting defense counsel during his opening statement and asking questions of counsel which in effect demanded that counsel certify his client's innocence, and later commenting that "you dodged my question." *United States v Frazier* (CA6 Tenn) 580 F2d 229, cert den 439 US 930, 58 L Ed 2d 324, 99 S Ct 319.

As to instructions respecting argument, see § 1235.

Annotations: 62 ALR2d 166 § 31[b].

13. *Kincade v State* (Tex Crim) 552 SW2d 832.

14. *People v Thomas* (1st Dist) 85 Ill App 2d 234, 229 NE2d 301.

15. *State v Russell* (Mo) 395 SW2d 151.

16. *Brandon v State* (Ala App) 542 So 2d 1316.

17. *Crawford v Rogers* (Alaska) 406 P2d 189.

18. *State v Melvin*, 326 NC 173, 388 SE2d 72.

19. *Oropesa v State* (Fla App D3) 555 So 2d 389, 14 FLW 2654, jur discharged, review den (Fla) 562 So 2d 346.

20. *Nicholson v Blanchette*, 239 Md 168, 210 A2d 732, 14 ALR3d 525, supp op 239 Md 188, 213 A2d 71, 14 ALR3d 539 and (ovrld on other grounds by *Deems v Western M.R. Co.*, 247 Md 95, 231 A2d 514); *State v Barron* (Mo) 465 SW2d 523, 49 ALR3d 1176; *Chailland v Smiley* (Mo) 363 SW2d 619, 5 ALR3d 288; *State v Nevills* (Mo App) 530 SW2d 52; *State v Faust*, 254 NC 101, 118 SE2d 769, 96 ALR2d 1422, cert den 368 US 851, 7 L Ed 2d 49, 82 S Ct 85; *State v Cokeley*, 159 W Va 664, 226 SE2d 40.

contempt or ridicule, or prejudice the party he represents.²¹ In rebuking counsel the degree of severity is left to the discretion of the trial judge so long as the rebuke does not prevent a party from having a fair trial.²² It is improper for the trial judge to unduly criticize counsel for a party in the presence of the jury.²³

Vigorous preventive measures are commendable, and if it appears that the reprimand was in consequence of misconduct, there is no error.²⁴ Such censure may take place in the presence of the jury.²⁵

It is improper and highly prejudicial for the trial judge to threaten to fine counsel if he should persist in offering evidence which the court regards as inadmissible, where counsel offers such evidence in good faith.²⁶

§ 306. —Contempt

The court may, in or out of the jury's presence, punish counsel for

21. *State v Nevills* (Mo App) 530 SW2d 52.

It was improper for the trial judge to remark, in the presence of the jury, that the court would look into disciplinary matters against defense counsel later on, in response to defense counsel's advising his client to assert his Fifth Amendment privilege against self-incrimination as, coming on the heels of an extended exchange between defense counsel and the trial judge on the issue of whether the defendant could plead the Fifth Amendment, the remark could have had no other effect than to demean defense counsel in the eyes of the jury, particularly as there was no apparent legal basis for the trial court's comment relative to disciplinary proceedings. *State v Pokini*, 57 Hawaii 17, 548 P2d 1397.

22. *Nicholson v Blanchette*, 239 Md 168, 210 A2d 732, 14 ALR3d 525, supp op 239 Md 188, 213 A2d 71, 14 ALR3d 539 and (ovrld on other grounds by *Deems v Western M.R. Co.*, 247 Md 95, 231 A2d 514); *State v Barron* (Mo) 465 SW2d 523, 49 ALR3d 1176; *Chailland v Smiley* (Mo) 363 SW2d 619, 5 ALR3d 288; *State v Faust*, 254 NC 101, 118 SE2d 769, 96 ALR2d 1422, cert den 368 US 851, 7 L Ed 2d 49, 82 S Ct 85.

As to what constitutes misconduct on the part of counsel, see §§ 497 et seq.

23. *Skelton v Beall* (Fla App D3) 133 So 2d 477, 94 ALR2d 820; *State v Tuttle*, 67 Ohio St 440, 66 NE 524.

Lawyers in most instances represent their clients with vigor and thereby feel compelled to object frequently to preserve their record. For this enthusiasm they should not be admonished in the presence of the jury unless their actions interfere with the decorum of the court or the orderly administration of justice. *Soap v State* (Okla Crim) 562 P2d 889.

The remarks of the trial judge during the

course of defense counsel's closing argument in the presence of the jury threatening defense counsel with a jail sentence, immediately after which defense counsel proceeded no further with argument were improper and constituted manifest error. The remarks of the court tended to impugn the credibility of counsel and to diminish him and his defense in the eyes of the jury. Counsel's ability to furnish effective representation was to that effect impaired, perhaps to the defendant's serious prejudice. *State v Simmons*, 267 SC 479, 229 SE2d 597.

24. *Roberson v United States* (CA5 Ala) 249 F2d 737, 72 ALR2d 434, cert den 356 US 919, 2 L Ed 2d 715, 78 S Ct 704; *Minneapolis v Canterbury*, 122 Minn 301, 142 NW 812; *State v Gyngard* (Mo) 333 SW2d 73, 90 ALR2d 639.

25. *Shelton v United States*, 469 US 857, 83 L Ed 2d 119, 105 S Ct 185; *Maulding v State*, 296 Ark 328, 757 SW2d 916, post-conviction proceeding (Ark) 1990 Ark LEXIS 141; *Colbert v United States* (Dist Col App) 471 A2d 258; *Williams v State*, 164 Ga App 562, 298 SE2d 282; *Commonwealth v Schulze*, 14 Mass App 343, 439 NE2d 826, revd on other grounds 389 Mass 735, 452 NE2d 216; *State v Faust*, 254 NC 101, 118 SE2d 769, 96 ALR2d 1422, cert den 368 US 851, 7 L Ed 2d 49, 82 S Ct 85; *Empire Oil & Refining Co. v Fields*, 188 Okla 666, 112 P2d 395, app dismd 314 US 572, 86 L Ed 463, 62 S Ct 79.

Generally, as to the admonition of counsel, see § 713.

Annotations: Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166 § 10[b].

26. *Sprinkle v Davis* (CA4 Va) 111 F2d 925, 128 ALR 1101; *Ballance v Dunnington*, 241 Mich 383, 217 NW 329, 57 ALR 262, later app 246 Mich 36, 224 NW 434.

contempt if undue prejudice does not result therefrom.²⁷ Punishing counsel for contempt, although in the presence of the jury, does not of itself cause a mistrial and is not ground for complaint, especially where the jurors are instructed to banish the incident from their minds.²⁸ However, where the citing of counsel for contempt in the presence of the jury amounts to depriving an accused in a criminal case of the right to counsel, the trial judge's action constitutes reversible error.²⁹ Unmerited rebuke is improper.³⁰ To threaten to punish counsel as for contempt if he persists in offering certain evidence³¹ or makes objections to offers of testimony³² is misconduct where counsel acts in good faith or the objections are proper, and may constitute reversible error.³³ It is improper and prejudicial for the trial court to threaten counsel with contempt for attempting to offer or elicit evidence which the court deems inadmissible but which is offered in good faith, particularly where, in a criminal case, the evidence of guilt is conflicting.³⁴

3. OBJECTIONS; EFFECT OF MISCONDUCT [§§ 307-320]

a. PRESERVATION OF ERROR [§§ 307, 308]

§ 307. Generally

Generally, prejudicial remarks made by the court in the course of a trial

27. *State v Nevills* (Mo App) 530 SW2d 52.

28. *United States v Baresh* (CA5 Tex) 790 F2d 392, 20 Fed Rules Evid Serv 1035; *United States v Hawley* (CA8 SD) 768 F2d 249, 85-2 USTC ¶9650, 18 Fed Rules Evid Serv 1274, 56 AFTR 2d 85-5557; *Howard v Jones Store Co.*, 123 Kan 620, 256 P 1019, 53 ALR 139; *Nicholson v Blanchette*, 239 Md 168, 210 A2d 732, 14 ALR3d 525, supp op 239 Md 188, 213 A2d 71, 14 ALR3d 539 and (ovrld on other grounds by *Deems v Western M.R. Co.*, 247 Md 95, 231 A2d 514); *Grant v State*, 67 Tex Crim 155, 148 SW 760.

There was no error in the trial court's warning to defense counsel threatening him with a contempt citation where defense counsel repeatedly ignored the rulings of the trial court, and his conduct interfered with the decorum of the court and the orderly administration of justice. *Rogers v State* (Okla Crim) 721 P2d 805.

As to instructions to disregard matters, see § 1456.

As to the misconduct of counsel as contempt of court, see 17 Am Jur 2d, Contempt §§ 80 et seq.

Annotations: Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 ALR2d 826 §§ 19, 49.

Remarks or acts of trial judge criticizing,

rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166 § 10[b].

29. *State v Collins*, 66 Wash 2d 71, 400 P2d 793.

30. *Sprinkle v Davis* (CA4 Va) 111 F2d 925, 128 ALR 1101; *Skelton v Beall* (Fla App D3) 133 So 2d 477, 94 ALR2d 820; *People v Robinson* (2d Dept) 71 App Div 2d 1008, 420 NYS2d 300; *Layton v Purcell* (Okla) 267 P2d 547.

31. *Sprinkle v Davis* (CA4 Va) 111 F2d 925, 128 ALR 1101; *Hansen v St. Paul C.R. Co.*, 231 Minn 354, 43 NW2d 260.

32. *Shepard v Brewer*, 248 Mo 133, 154 SW 116; *State v Rudd*, 60 NC App 425, 299 SE2d 251.

Annotations: Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 ALR2d 826 § 38[a].

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166 § 32[d].

33. *Hansen v St. Paul C.R. Co.*, 231 Minn 354, 43 NW2d 260.

34. *State v Cokeley*, 159 W Va 664, 226 SE2d 40.

must be seasonably objected to and an exception noted;³⁵ that is, as a rule, the exceptions must be taken at the time the remarks are made.³⁶ In the absence of timely objection, the question will ordinarily not be reviewed on appeal.³⁷ Failure to timely object to allegedly prejudicial statements or actions by the trial judge may result in a waiver of error.³⁸

■■■■ *Practice guide:* If a party believes that remarks may prejudice his cause, he should object immediately and afford the court an opportunity to correct any erroneous impression, and the issue is not timely presented when raised for the first time in a motion for a new trial.³⁹

On the other hand, there is authority for the proposition that a less rigid application of the rule requiring timely and proper objection and preservation of rulings thereon should prevail where the basis for the objection is conduct of the trial judge.⁴⁰

The Federal Rules of Criminal Procedure provide that plain errors or defects affecting substantial rights may be noticed even if not brought to the court's attention.⁴¹ Some of the federal courts have treated a trial judge's remarks expressing his opinion that the accused was guilty as plain error under this rule, and reversed the accused's conviction because of such remarks even in the absence of timely exception.⁴²

§ 308. Violation of "Griffin Rule"

While there is some authority indicating that a defendant's failure to make a timely objection to an error consisting of a comment by the trial judge in violation of the Griffin Rule, which forbids comment by the court on the accused's failure to testify, precludes him from later asserting the right to

35. *People v Clay* (1st Dist) 227 Cal App 2d 87, 38 Cal Rptr 431, 100 ALR2d 1421; *People v Mays* (5th Dist) 188 Ill App 3d 974, 136 Ill Dec 489, 544 NE2d 1264; *Le Blanc v Ford Motor Co.*, 346 Mass 225, 191 NE2d 301, 6 ALR3d 83; *Chailland v Smiley* (Mo) 363 SW2d 619, 5 ALR3d 288.

As to an objection to the interrogation of witnesses by the judge, see 81 Am Jur 2d, *Witnesses* § 421.

36. *Jackson Yellow Cab Co. v Alexander*, 246 Miss 268, 148 So 2d 674; *Tulsa Hospital Ass'n v Juby*, 73 Okla 243, 175 P 519, 22 ALR 333; *Lipscomb v Poole*, 247 SC 425, 147 SE2d 692.

Good practice requires a party believing himself prejudiced by conduct of the judge at the trial to voice an objection at the time of the occurrence and to move for a mistrial. *Southern R. Co. v Miller* (CA6 Tenn) 285 F2d 202, 85 ALR2d 842.

37. 5 Am Jur 2d, *Appeal and Error* § 622.

38. *McClave v Crescimanno*, 44 NC App 10, 260 SE2d 110 (further holding that plaintiff's claim that the trial court committed prejudicial error by directing counsel for both the plaintiff and the defendant to "move on" was waived by the plaintiff's failure to object at the time).

Any error in a suggestion of compromise by the trial judge is waived by failing to except at the time, or to move for discharge of the jury. *Harrington v Boston E.R. Co.*, 229 Mass 421, 118 NE 880, 2 ALR 1057.

39. *State v Nevills* (Mo App) 530 SW2d 52.

40. *People v Sprinkle*, 27 Ill 2d 398, 189 NE2d 295; *People v Mays* (5th Dist) 188 Ill App 3d 974, 136 Ill Dec 489, 544 NE2d 1264.

Given the fundamental importance of a fair trial and the practical difficulties involved in objecting to the conduct of the trial judge the waiver rule is applied less rigidly when the judge's conduct is the basis for the objection. *People v Velasco* (1st Dist) 184 Ill App 3d 618, 132 Ill Dec 781, 540 NE2d 521, app den (Ill) 136 Ill Dec 603, 545 NE2d 127.

41. Rule 52(b), Fed Rules of Crim Proc.

42. *United States v Shepherd* (CA7 Ind) 576 F2d 719, cert den 439 US 852, 58 L Ed 2d 155, 99 S Ct 158; *United States v Woods* (CA2 NY) 252 F2d 334.

Annotations: Propriety and prejudicial effect of federal judge's expressing to jury his opinion as to defendant's guilt in criminal case, 7 ALR Fed 377 § 7.

complain of such an error,⁴³ it has often been held that such an error may properly be considered by an appellate court even if no objection was made in the lower court.⁴⁴

b. EFFECT OF MISCONDUCT [§§ 309–317]

§ 309. Generally

Not every improper remark of a trial court will justify a reversal.⁴⁵ A judge is necessarily allowed discretion in expressing himself while controlling trial of a case, and reversal of the judgment for a judge's comments should not be ordered unless there is a showing of impropriety coupled with probable prejudice and rendition of an improper verdict.⁴⁶

Although a trial judge should refrain from remarks which may excite prejudice in the minds of jurors, the mere possibility of prejudice from a remark of the judge is not sufficient to overturn a verdict or judgment, and, where a construction can properly and reasonably be given to a remark which will render it unobjectionable, it will not be regarded as prejudicial.⁴⁷ An unwise or irrelevant remark made by the judge during the course of a trial does not compel the granting of a new trial unless the remark is of such a nature or is delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair trial.⁴⁸

Any remark by the judge in the presence of the jury which has a tendency to prejudice their minds against the unsuccessful party affords ground for reversal of the judgment.⁴⁹ In a criminal case, the judge's strictures can handicap an attorney to the degree that the defendant's right to have assistance of counsel is abridged.⁵⁰ The expression of an opinion by the trial judge can deprive an accused of a fair trial, but whether the challenged remarks were prejudicial

43. *United States v Shultz* (CA6 Tenn) 482 F2d 1179, 25 ALR Fed 201; *United States v Attaway* (CA5 Ga) 449 F2d 309; *State v Dessureault*, 104 Ariz 439, 454 P2d 981; *Hanf v State* (Okla Crim) 560 P2d 207.

As to the application of the Griffin Rule to comments by counsel, see §§ 574 et seq.

Annotations: Failure to object to improper questions or comments as to defendant's pre-trial silence or failure to testify as constituting waiver of right to complain of error—modern cases, 32 ALR4th 774 § 5[a].

44. *Hampton v State* (Alaska) 569 P2d 138, cert den and app dismd 434 US 1056, 55 L Ed 2d 757, 98 S Ct 1225, reh den 435 US 981, 56 L Ed 2d 75, 98 S Ct 1634; *People v Murry*, 59 Mich App 555, 229 NW2d 845; *State v Gray* (Mo App) 503 SW2d 457, later app (Mo App) 549 SW2d 99; *State v Fioravanti*, 46 NJ 109, 215 A2d 16, cert den 384 US 919, 16 L Ed 2d 440, 86 S Ct 1365.

Notwithstanding the absence of an objection by the defendant, who represented himself, the clear comment of the judge on the failure of the defendant to have testified in his own behalf at the trial impelled reversal for a new trial. *McClain v State* (Fla App D3) 353 So 2d 1215, cert den (Fla) 367 So 2d 1126.

Annotations: 32 ALR4th 774 § 5[b].

45. *United States v Slone* (CA6 Ky) 833 F2d 595, 24 Fed Rules Evid Serv 339; *Gaines v State* (Okla Crim) 568 P2d 1290.

46. *Food Source, Inc. v Zurich Ins. Co.* (Tex App Dallas) 751 SW2d 596, writ den.

Upon a contention by an accused that he was denied a fair and impartial trial by the remarks of the trial judge, the appellate court must guard against the magnification of instances which were of little importance in their setting. *United States v Stoehr* (CA3 Pa) 196 F2d 276, 52-1 USTC ¶ 9299, 41 AFTR 1190, 33 ALR2d 836, cert den 344 US 826, 97 L Ed 643, 73 S Ct 28.

47. *White v New Hampshire Ins. Co.*, 227 Kan 293, 607 P2d 43.

48. *Commonwealth v Porter*, 300 Pa Super 260, 446 A2d 605.

49. *Lee v Artis*, 205 Va 343, 136 SE2d 868 (ovrld on other grounds by *Scott v Greater Richmond Transit Co.* (Va) 402 SE2d 214).

50. *United States v Ah Kee Eng* (CA2 NY) 241 F2d 157, 62 ALR2d 159.

must be determined by what was said, and the probable effect of the remarks upon the jury in light of all attendant circumstances.⁵¹ The test to determine if a judicial comment in the jury's presence constitutes reversible error is whether the remark was such that it was reasonably calculated to benefit the state or to prejudice the defendant's rights.⁵² For comments by the trial judge to constitute reversible error the defendant must show that the remarks were prejudicial and that he or she was harmed thereby. Even when the court's method of ruling on an objection indicates an opinion as to the validity of a party's position, the context of the judge's remarks must be considered in determining whether prejudice resulted.⁵³

■■■■ Observation: An accepted guide in determining prejudicial effect is that, if the remark may be said with fair assurance to have had but a slight effect upon the jury, if any at all, and one is not left in doubt that it had no substantial influence in the case, it will not vitiate an otherwise fair trial.⁵⁴

Any court declaration prejudicing the accused in the minds of the jurors is error necessitating a reversal whether the remarks are made before or after the jury is impanelled.⁵⁵

In predicating a claim of reversible error upon the remarks of the trial court made during the course of a bench trial, the defendant must show that he had in some fashion been harmed by them.⁵⁶

§ 310. Disparaging civil litigants

Although remarks of the trial judge, during a civil jury trial, disparaging one of the litigants in the eyes of the jury may result in reversible error,⁵⁷ there are

51. *State v Snowden*, 51 NC App 511, 277 SE2d 105, petition den 303 NC 318, 281 SE2d 657; *Commonwealth v Vorhauer*, 232 Pa Super 84, 331 A2d 815.

The determination of the prejudicial character of improper conduct and comments of a trial judge in most cases depends upon the issues, parties, and general circumstances of each case. *Parker v State* (Ala App) 549 So 2d 989, later app (Ala App) 1990 Ala Crim App LEXIS 1681, op withdrawn, substituted op (Ala App) 1990 Ala Crim App LEXIS 2091, reh den, without op (Ala App) 1991 Ala Crim App LEXIS 125.

52. *Betancourt v State* (Tex App Corpus Christi) 657 SW2d 451, petition for discretionary review ref.

Livingston v State (Tex App Dallas) 782 SW2d 12, petition for discretionary review ref (Jun 27, 1990); *Davis v State* (Tex Crim) 651 SW2d 787; *Hernandez v State* (Tex Crim) 507 SW2d 209.

53. *People v Velasco* (1st Dist) 184 Ill App 3d 618, 132 Ill Dec 781, 540 NE2d 521, app den 136 Ill Dec 603, 545 NE2d 127.

54. *Commonwealth v Vorhauer*, 232 Pa Super 84, 331 A2d 815.

55. *Parker v State* (Ala App) 549 So 2d 989,

later app (Ala App) 1990 Ala Crim App LEXIS 1681, op withdrawn, substituted op (Ala App) 1990 Ala Crim App LEXIS 2091, reh den, without op (Ala App) 1991 Ala Crim App LEXIS 125.

56. *People v Hanley* (1st Dist) 50 Ill App 3d 651, 8 Ill Dec 438, 365 NE2d 676.

57. *Laney v American Airlines, Inc.* (CA6 Mich) 295 F2d 723.

Comments by the trial court during the course of the court's examination of the mother in a conservatorship proceeding to the effect that the mother's second husband was bad for the child, that he did not care, that the mother had less concern for the child than for her husband, and that the child was not comfortable living in a home with the mother and stepfather, were prejudicial and required reversal as the jury might reasonably have inferred from the remarks that the trial court's assertions were true even though they were made without factual support. *Brown v Russell* (Tex App Fort Worth) 703 SW2d 843.

Annotations: Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging the litigants, the witnesses, or the subject matter of the litigation, 83 ALR2d 1128 § 7[a].

cases in which the comments in question were held not sufficiently prejudicial to affect the jury's determination and therefore not to justify a reversal.⁵⁸

The courts have reached similar results where the remarks were made to or regarding a litigant as a witness.⁵⁹ In a number of cases the conduct of a litigant while on the witness stand was held to have been such as to justify the remarks made by the judge, or at least such remarks were held not to constitute reversible error on the ground that they prejudicially disparaged such litigant-witness.⁶⁰

§ 311. Disparaging accused

In determining whether a trial judge's remarks disparaging the accused in a criminal case were sufficiently prejudicial in their effect to constitute reversible error, the courts have frequently considered a number of factors in relation to the remarks, such as the circumstances under which, and the manner in which, such remarks were made, as well as the peculiar impact of such remarks on the case itself,⁶¹ and the existence⁶² or lack⁶³ of justification or excuse for such

58. *Smith v Maticka*, 305 Mich 32, 8 NW2d 900; *Re Estate of Arnson*, 2 Mich App 478, 140 NW2d 546; *Lee v Barnes*, 58 Wash 2d 265, 362 P2d 237.

While the trial judge's conduct in exhibiting impatience with the plaintiff's inept examination of witnesses, sometimes taking over the job himself, and in demeaning the quality and relevance of much of the plaintiff's evidence, suggesting his own nondiscriminatory reasons for some of the employer's behavior and even disparaging Congressional wisdom in enacting Title 7 was "borderline," it did not ultimately prejudice the plaintiff's case, which rested chiefly on her own uncorroborated and heavily impeached testimony, and in which several defense witnesses, none of whom were still employed by the defendant, corroborated the employer's version of the events, offering credible, legitimate explanations for the company's actions. *Ward v Westland Plastics, Inc.* (CA9 Cal) 651 F2d 1266, 23 BNA FEP Cas 128, 23 CCH EPD ¶ 31093 (disapproved on other grounds by Texas Dept. of Community Affairs v *Burdine*, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089, 25 BNA FEP Cas 113, 25 CCH EPD ¶ 31544, 9 Fed Rules Evid Serv 1) as stated in *Sumner v San Diego Urban League, Inc.* (CA9 Cal) 681 F2d 1140, 29 BNA FEP Cas 707, 29 CCH EPD ¶ 32970.

A claim that the trial court is guilty of misconduct and abuse of discretion premised upon the trial judge's express acknowledgment of the respondent but not of the appellant upon concluding a colloquy among participants at a hearing at a motion to tax costs was "extravagantly absurd" and amounted to a frivolous appeal warranting sanctions. *Conservatorship of Gollock* (3rd Dist) 130 Cal App 3d 271, 181 Cal Rptr 547.

Annotations: 83 ALR2d 1128 § 7[a].

59. *Speagle v Nationwide Mut. Fire Ins. Co.*, 138 Ga App 384, 226 SE2d 459 (remarks held prejudicial); *Morgan v Mull*, 101 Ga App 36, 112 SE2d 661 (remarks held not prejudicial); *Spence v Miller*, 197 Va 477, 90 SE2d 131 (remarks held prejudicial).

A new trial was required in a complex wrongful death action arising out of alleged medical malpractice where the court's marshaling of the facts, inter alia, manifested mistrust, skepticism, and bias on the part of the court as to the credibility of the decedent's treating physician, and where the court's instructions as to the defendant doctor were susceptible of the interpretation that the court was of the opinion that the doctor was an incompetent practitioner. *Theodoropoulos v New York City Health & Hospitals Corp.* (2d Dept) 90 App Div 2d 792, 455 NYS2d 401.

Annotations: 83 ALR2d 1128 § 8[b], 9[c].

60. *Engineering Service Corp. v Longridge Invest. Co.* (2nd Dist) 153 Cal App 2d 404, 314 P2d 563; *Felix v Hall-Brooke Sanitarium*, 140 Conn 496, 101 A2d 500 (not followed on other grounds by *Speed v De Libero*, 19 Conn App 95, 561 A2d 959, app gr, in part 212 Conn 813, 565 A2d 537 and *revd* 215 Conn 308, 575 A2d 1021, on remand 23 Conn App 437, 580 A2d 1242, app den 216 Conn 832, 583 A2d 130); *Cohen v Bridges*, 255 Wis 535, 39 NW2d 373.

As to remarks by the trial judge disparaging the defense or the subject matter or the importance of the litigation, see § 283.

As to the trial judge's disparaging remarks to witnesses, see § 299.

Annotations: 83 ALR2d 1128 § 8[b].

61. *United States v Pierce* (CA8 Mo) 792 F2d 740; *Hunter v United States* (CA5 Tex) 62 F2d 217.

remarks.

§ 312. —Expressing opinion as to accused's guilt

Subject to these limitations, comment by the court on the evidence, where such comment is permissible, may not constitute reversible error from the fact that it contains an expression of the judge's opinion as to the guilt or innocence of the accused.⁶⁴ However, a statement that the court feels that the prosecution has sustained the burden cast upon it and has proved the defendant guilty beyond a reasonable doubt is prejudicially erroneous, even though prefaced with the statement that what the court says as to the facts is only the court's view.⁶⁵

§ 313. —Violation of "Griffin Rule"

The Supreme Court, as well as other courts, has declined to hold that a violation of the Griffin Rule, which prohibits comment by the trial judge on the accused's failure to testify, is prejudicial per se, so as automatically to constitute a ground for reversal.⁶⁶ Some courts, however, have indicated that a violation of the Griffin Rule by the trial judge's commenting on the guilt of the accused is so inherently prejudicial as to warrant automatic reversal.⁶⁷

The question of whether a violation of the Griffin Rule constitutes harmless error rather than prejudicial error is a federal question, and, as a matter of federal law, before such an error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt,⁶⁸ and the prosecution must show that there was no reasonable possibility that the error

Annotations: Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused, 34 ALR3d 1313 § 4 (for specific illustrations, see §§ 10-25).

62. *Vinci v United States*, 81 App DC 386, 159 F2d 777; *Vedron v State*, 163 Ind App 28, 321 NE2d 847; *State v Salgado* (La App 5th Cir) 473 So 2d 84, cert den (La) 478 So 2d 1233; *State v Atkinson*, 51 NC App 683, 277 SE2d 464; *Commonwealth v Henderson*, 275 Pa Super 350, 418 A2d 757.

Annotations: 34 ALR3d 1313 § 8.

63. *Berry v United States* (CA8 Mo) 283 F2d 465, cert den 364 US 934, 5 L Ed 2d 366, 81 S Ct 380; *State v Wendel* (Mo App) 532 SW2d 838.

Annotations: 34 ALR3d 1313 § 9.

64. *Masters v United States*, 42 App DC 350.

As to the court's right to comment on the evidence, see §§ 280, 281.

65. *United States v Murdock*, 290 US 389, 78 L Ed 381, 54 S Ct 223, 3 USTC ¶1194, 13 AFTR 821 (ovrld on other grounds by *Murphy v Waterfront Com. of New York Harbor*, 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594, 56 BNA LRRM 2544, 49 CCH LC ¶51102, motion den 379 US 898, 13 L Ed 2d 174, 85 S Ct 183) as stated in *People v Smith* (3d Dist) 102 Ill App 3d 226, 57 Ill Dec 753, 429 NE2d 870.

66. *Chapman v California*, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, reh den 386 US 987, 18 L Ed 2d 241, 87 S Ct 1283.

As to the impropriety of comments by the trial judge on the accused's failure to testify, see § 292.

Annotations: Violation of federal constitutional rule (*Griffin v California*) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 ALR3d 1093 (§ 10 superseded by Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases, 32 ALR4th 774) § 5.

67. *State v Dessureault*, 104 Ariz 380, 453 P2d 951, reh den 104 Ariz 439, 454 P2d 981 and cert den 397 US 965, 25 L Ed 2d 257, 90 S Ct 1000.

Annotations: 24 ALR3d 1093 § 5.

68. *Chapman v California*, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, reh den 386 US 987, 18 L Ed 2d 241, 87 S Ct 1283; *United States v Blassick* (CA7 Ind) 422 F2d 652, cert den 402 US 985, 29 L Ed 2d 150, 91 S Ct 1672.

Annotations: 24 ALR3d 1093 § 4.

contributed to the defendant's conviction.⁶⁹ In determining whether a violation of the Griffin Rule by the trial judge's commenting on the accused's guilt has any reasonable possibility of affecting the verdict, so as to constitute prejudicial error rather than harmless error, the courts have given major consideration to the nature and extent of the comments upon the defendant's failure to testify in comparison with the strength of the evidence of the defendant's guilt. Some cases have held that the trial judge's improper comments on the defendant's failure to testify were so extensive or of such a serious or inflammatory nature as to constitute prejudicial error,⁷⁰ whereas other cases have held that such comments were of such a limited extent or insignificant nature as to constitute harmless error.⁷¹ Some cases have held that in view of weaknesses in the evidence against the defendant, improper comments on his failure to testify constituted prejudicial error,⁷² but other cases have held that the evidence of the defendant's guilt was so strong that such comments constituted harmless error.⁷³

§ 314. Remarks to or respecting witnesses

Prejudicial error may be caused by a remark of the trial judge which disparages⁷⁴ or intimidates⁷⁵ a witness, although there are cases in which the questioned remarks were found not so disparaging as to warrant a reversal.⁷⁶

69. *Chapman v California*, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, reh den 386 US 987, 18 L Ed 2d 241, 87 S Ct 1283; *State v Martin (App)* 84 NM 27, 498 P2d 1370; *Commonwealth v Davis*, 452 Pa 171, 305 A2d 715.

Annotations: 24 ALR3d 1093 § 6[a].

70. *Anderson v Nelson*, 390 US 523, 20 L Ed 2d 81, 88 S Ct 1133, reh den 391 US 929, 20 L Ed 2d 670, 88 S Ct 1812.

Annotations: 24 ALR3d 1093 § 8[a].

71. *People v Brady* (4th Dist) 275 Cal App 2d 984, 80 Cal Rptr 418 (disagreed with on other grounds by *People v Mendoza* (Cal App) slip op).

The trial judge's comment "you've got me" in response to a juror's question as to why a person who was not guilty would refuse to testify in their own defense, while unfortunate and ill-considered, did not require reversal where, considered as a whole, the judge's entire response, including clarifying explanation that no inference of guilt could be drawn from the accused's failure to testify was neither misleading nor erroneous, and where it was difficult to credit the accused's argument that the court's comment forced his trial counsel to put him on the witness stand. *Provence v State (Fla)* 337 So 2d 783, cert den 431 US 969, 53 L Ed 2d 1065, 97 S Ct 2929.

Annotations: 24 ALR3d 1093 § 8[b].

72. *Anderson v Nelson*, 390 US 523, 20 L Ed 2d 81, 88 S Ct 1133, reh den 391 US 929, 20 L Ed 2d 670, 88 S Ct 1812.

Annotations: 24 ALR3d 1093 § 9[a].

73. *State v Fioravanti*, 46 NJ 109, 215 A2d 16, cert den 384 US 919, 16 L Ed 2d 440, 86 S Ct 1365.

Annotations: 24 ALR3d 1093 § 9[b].

74. *Glowacki v A.J. Bayless Markets, Inc.*, 76 Ariz 295, 263 P2d 799; *Burkey v Kornegay*, 261 NC 513, 135 SE2d 204.

A comment by the judge that the witness was a young lady of perhaps weak mentality was prejudicial where there was nothing in the record bearing on the mental condition of the witness. *Burkey v Kornegay*, 261 NC 513, 135 SE2d 204.

Annotations: Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging the litigants, the witnesses, or the subject matter of the litigation, 83 ALR2d 1128 § 8[a].

75. *People v Davison* (2d Dept) 3 App Div 2d 724, 159 NYS2d 754; *State v Rogers*, 173 NC 755, 91 SE 854.

76. *Rasmussen Drilling, Inc. v Kerr-McGee Nuclear Corp.* (CA10 Wyo) 571 F2d 1144, cert den 439 US 862, 58 L Ed 2d 171, 99 S Ct 183; *Woodring v United States* (CA8 Mo) 311 F2d 417, cert den 373 US 913, 10 L Ed 2d 414, 83 S Ct 1304; *Stehouwer v Lewis*, 249 Mich 76, 227 NW 759, 74 ALR 844.

The judge's remark that the witness did not know what testifying meant was not degradation of the witness in the eyes of the jury; rather, the judge merely wished to call counsel's attention to the distinction between "testifying" and simply speaking in a courtroom.

Particular remarks by the trial judge to or regarding a witness may not constitute error, or at least not prejudicial error, in view of the conduct of such witness while on the stand.⁷⁷

There are many cases in which comments, insinuations, or suggestions indicative of belief or disbelief on the part of the trial judge in the integrity or credibility of a witness have been held prejudicially erroneous in that they disparaged the credibility of the witness.⁷⁸ The making of any remark by the court to or concerning a witness, in the presence of the jury, whether favorable or unfavorable to his testimony, as regards its freedom from perjury, singling it out and giving it undue prominence in either minimizing its value or exaggerating its reliability, constitutes reversible error.⁷⁹

§ 315. —Disparaging expert witness

Prejudicial error has been predicated upon remarks of the trial judge disparaging expert witnesses during the trial,⁸⁰ although in a number of cases, remarks made by a judge during the trial in relation to expert witnesses have been held not improper or not prejudicial.⁸¹

§ 316. Remarks to or respecting attorneys

Not every unguarded remark by a trial justice in the presence of a jury which indicates his displeasure with counsel's action is a ground for reversal.⁸² Whether the accused was deprived of a fair trial by the challenged remarks of the trial judge directed to counsel must be determined by what was said and probable effect of the remarks upon the jury in light of all attendant circumstances.⁸³ The test of error, when it is alleged that the trial judge demonstrated a hostile attitude toward counsel, is whether the trial court's remarks

Vander Veen v Yellow Cab Co. (1st Dist) 89 Ill App 2d 91, 233 NE2d 68.

Annotations: 83 ALR2d 1128 § 8[a].

77. *Smith v Atco Co.*, 6 Wis 2d 371, 94 NW2d 697, 74 ALR2d 1095.

Annotations: 83 ALR2d 1128 § 8[a].

78. *Myers v George* (CA8 Iowa) 271 F2d 168, 83 ALR2d 1121; *Gendzier v Bielecki* (Fla) 97 So 2d 604; *Crenshaw v Southern R. Co.*, 214 SC 553, 53 SE2d 789.

Annotations: 83 ALR2d 1128 § 9[a].

79. *Marshall v Carr*, 271 Pa 271, 114 A 500; *Lahon v State*, 98 Tex Crim 167, 265 SW 392.

80. *Glowacki v A.J. Bayless Markets, Inc.*, 76 Ariz 295, 263 P2d 799; *Gramza v Gajewski* (4th Dept) 23 App Div 2d 817, 258 NYS2d 469.

Annotations: Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging the litigants, the witnesses, or the subject matter of the litigation, 83 ALR2d 1128 § 10.

81. *Lewis v Read*, 80 NJ Super 148, 193 A2d 255, certif gr 41 NJ 121, 195 A2d 17; *Union Traction Co. v Anderson*, 146 Tenn 476, 242 SW 876, 25 ALR 1496 (not followed on other

grounds by *Ledford v Francis* (Tenn App) 1988 Tenn App LEXIS 813).

Comments by the trial judge in the presence of the jury that an expert witness was not necessarily infallible and that only the Almighty knew exactly what happened could be given an unobjectionable construction and, thus, they were not reversibly prejudicial. *White v New Hampshire Ins. Co.*, 227 Kan 293, 607 P2d 43.

As to the trial judge's comments in the charge on the credibility of expert witnesses, see § 1408.

As to remarks by the trial judge disparaging the defense or the subject matter or the importance of the litigation, see § 283.

As to remarks by the trial judge disparaging the litigants in a civil case tried to the jury, see § 310.

As to the trial judge's disparaging remarks about the accused during trial, see § 291.

Annotations: 83 ALR2d 1128 § 10.

82. *Pescatore v MacIntosh*, 113 RI 139, 319 A2d 21.

83. *State v Nevills* (Mo App) 530 SW2d 52; *State v Faircloth*, 297 NC 388, 255 SE2d 366.

may have prejudiced the minds of the jurors, depriving the defendant of his right to a fair trial.⁸⁴

In determining whether the judge, in his dealing with counsel, denied the defendant in a criminal case a fair trial, there is a tendency to view more seriously a series of displays of bad nature than a violent but isolated flareup;⁸⁵ and mistreatment of counsel, standing alone, is less likely to call for reversal than if coupled with other error.⁸⁶

Practice guide: The burden of showing prejudice is upon the appellant.⁸⁷

Generally speaking, the fact that the jury sees and hears the judge scold, criticize, threaten, or even punish a criminal defendant's attorney is not alone sufficient ground for reversal or new trial.⁸⁸ The courts are more likely to reverse conviction if the incident occurs while the jury is present.⁸⁹ As a rule, the courts reverse conviction for maltreatment of the accused's attorney more readily in cases where evidence of guilt is conflicting than where there is little or no defense.⁹⁰

Where the jury may assess punishment as well as determine guilt, the courts, in their efforts to ascertain if the judge harmed the defendant by disciplining his attorney, have looked to the severity of the penalty inflicted.⁹¹ Acquittal of the defendant on some of the counts of an indictment has been

84. *State v Jones* (Mo App) 558 SW2d 242, cert den 435 US 970, 56 L Ed 2d 61, 98 S Ct 1609.

85. *United States v Dellinger* (CA7 Ill) 472 F2d 340, 22 ALR Fed 159, cert den 410 US 970, 35 L Ed 2d 706, 93 S Ct 1443; *People v Burns*, 109 Cal App 2d 524, 241 P2d 308, hear den by sup ct as reported in 109 Cal App 2d 556, 242 P2d 9; *State v Hardwick*, 1 Conn App 609, 475 A2d 315, app den 193 Conn 804, 476 A2d 145; *Commonwealth v Sylvester*, 388 Mass 749, 448 NE2d 1106; *State v Frazier*, 278 NC 458, 180 SE2d 128; *State v Hewitt*, 19 NC App 666, 199 SE2d 695; *State v Hedding*, 122 Vt 379, 172 A2d 599 (superseded by statute on other grounds as stated in *State v Brean*, 136 Vt 147, 385 A2d 1085).

Annotations: Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166 § 8[a].

86. *Sunderland v United States* (CA8 Neb) 19 F2d 202; *People v Fatone* (4th Dist) 165 Cal App 3d 1164, 211 Cal Rptr 288; *Bethel v State*, 123 Fla 806, 167 So 685; *Gamble v State* (Fla App D5) 492 So 2d 1132, 11 FLW 1724; *Gordon v State* (Fla App D4) 449 So 2d 1302.

Annotations: 62 ALR2d 166 § 8[b].

87. *State v Faircloth*, 297 NC 388, 255 SE2d 366.

88. *Battle v United States*, 209 US 36, 52 L Ed 670, 28 S Ct 422 (counsel interrupted and

admonished not to appeal to racial prejudice); *United States v Tuchow* (CA7 Ill) 768 F2d 855, 18 Fed Rules Evid Serv 699; *Nix v State*, 20 Okla Crim 373, 202 P 1042, 26 ALR 1053 (attorney's good faith in making an affidavit questioned).

Annotations: 62 ALR2d 166 § 10[a, b].

89. *United States v Buchanan* (CA10 Okla) 787 F2d 477, 20 Fed Rules Evid Serv 402, later proceeding (CA10 Okla) 830 F2d 146, later proceeding (CA10 Okla) 891 F2d 1436, cert den (US) 108 L Ed 2d 958, 110 S Ct 1829 and (ovrld by *United States v Welch* (CA10) 1991 US App LEXIS 4304); *United States v Ah Kee Eng* (CA2 NY) 241 F2d 157, 62 ALR2d 159; *McCall v State* (Ala App) 501 So 2d 496; *Jones v State* (Fla App D4) 385 So 2d 132; *State v Shaver*, 233 Mont 438, 760 P2d 1230; *People v Sanzo* (2d Dept) 122 App Div 2d 817, 505 NYS2d 697; *People v Johns* (2d Dept) 69 App Div 2d 843, 415 NYS2d 71; *Commonwealth v Davis*, 497 Pa 335, 440 A2d 1185.

Annotations: 62 ALR2d 166 § 10[c].

90. *United States v Wheeler* (CA7 Ill) 219 F2d 773, cert den 349 US 944, 99 L Ed 1271, 75 S Ct 872 (evidence of guilt overwhelming); *Ash v State*, 93 Okla Crim 125, 225 P2d 816 (evidence of guilt conflicting).

Annotations: 62 ALR2d 166 § 11.

91. *Ash v State*, 93 Okla Crim 125, 225 P2d 816.

Annotations: 62 ALR2d 166 § 12.

considered as tending to show that the jury was not influenced by the defense attorney's being criticized or punished by the judge.⁹²

In cases where the defendant's attorney has been roughly handled by the judge, courts sometimes look to the further activities and efforts of the attorney. If he appears to have been little affected by the incident, it is taken as a sign that the judge did not damage the defendant's case,⁹³ but if it appears that following the episode the attorney was cowed and less effective, it may be assumed that the defense was impaired.⁹⁴

Where the judge's severity is visited indifferently on the defendant's counsel and the prosecuting attorney, the courts usually hold that no reversible error, if error at all, is committed.⁹⁵ On the other hand, if the judge places undue strictures on the conduct of defense counsel while giving the prosecuting attorney a loose rein, the defendant's rights are likely to be regarded as prejudiced.⁹⁶

The fact that the judge, in criticizing or punishing the defendant's attorney, refrained from indicating an opinion relative to the issue of the accused's guilt has been given as a ground for concluding that there was no harm done to the defendant's case.⁹⁷ The judge's criticizing or punishing the defendant's attor-

92. *United States v Abrams* (CA5 Fla) 568 F2d 411, cert den 437 US 903, 57 L Ed 2d 1133, 98 S Ct 3089; *Todorow v United States* (CA9 Cal) 173 F2d 439, cert den 337 US 925, 93 L Ed 1733, 69 S Ct 1169.

Annotations: 62 ALR2d 166 § 13.

93. *United States v Robinson* (CA2 NY) 635 F2d 981, 7 Fed Rules Evid Serv 663, cert den 451 US 992, 68 L Ed 2d 852, 101 S Ct 2333; *United States v Carrion* (CA9 Cal) 463 F2d 704; *Krogmann v United States* (CA6 Ohio) 225 F2d 220; *Steinberg v United States* (CA5 Tex) 162 F2d 120, 47-1 USTC ¶9286, 36 AFTR 42, cert den 332 US 808, 92 L Ed 386, 68 S Ct 108; *Rodriguez v State* (Tex Crim) 552 SW2d 451.

Annotations: 62 ALR2d 166 § 14.

94. *Meeks v United States* (CA9 Alaska) 163 F2d 598; *State v Simmons*, 267 SC 479, 229 SE2d 597.

Annotations: 62 ALR2d 166 § 14.

95. *United States v Kimbrell* (CA5 Fla) 470 F2d 280; *Herman v United States* (CA5 Fla) 289 F2d 362, cert den 368 US 897, 7 L Ed 2d 93, 82 S Ct 174 and (disagreed with on other grounds by *United States v Espinosa-Cerpa* (CA5 Fla) 630 F2d 328) as stated in *United States v Raffone* (CA11 Fla) 693 F2d 1343, cert den 461 US 931, 77 L Ed 2d 303, 103 S Ct 2094 and (ovrld on other grounds by *United States v Andrews* (CA11 Fla) 850 F2d 1557, cert den 488 US 1032, 102 L Ed 2d 974, 109 S Ct 842); *Munson v State*, 250 Ala 94, 33 So 2d 463; *Paramore v State* (Fla) 229 So 2d 855, vacated on other grounds 408 US 935, 33 L Ed 2d 751, 92 S Ct 2857; *People v Hanley* (1st Dist) 50 Ill App. 3d 651, 8 Ill Dec 438, 365

NE2d 676; *State v Whalon*, 1 Wash App 785, 464 P2d 730, review den 78 Wash 2d 992.

Annotations: 62 ALR2d 166 § 15.

96. *People v Burns*, 109 Cal App 2d 524, 241 P2d 308, hear den by sup ct as reported in 109 Cal App 2d 556, 242 P2d 9; *Williams v State* (Fla) 143 So 2d 484; *People v Kepner*, 267 App Div 838, 46 NYS2d 111.

Annotations: 62 ALR2d 166 § 15.

97. *United States v Buchanan* (CA10 Okla) 787 F2d 477, 20 Fed Rules Evid Serv 402, later proceeding (CA10 Okla) 830 F2d 146, later proceeding (CA10 Okla) 891 F2d 1436, cert den (US) 108 L Ed 2d 958, 110 S Ct 1829 and (ovrld by *United States v Welch* (CA10) 1991 US App LEXIS 4304); *United States v Boatner* (CA2 NY) 478 F2d 737, cert den 414 US 848, 38 L Ed 2d 96, 94 S Ct 136; *Kohatsu v United States* (CA9 Cal) 351 F2d 898, 65-2 USTC ¶9715, 16 AFTR 2d 5848, cert den 384 US 1011, 16 L Ed 2d 1017, 86 S Ct 1915, reh den 385 US 891, 17 L Ed 2d 122, 87 S Ct 15; *Rogers v State*, 257 Ark 144, 515 SW2d 79, cert den 421 US 930, 44 L Ed 2d 87, 95 S Ct 1656; *People v Dickenson* (4th Dist) 210 Cal App 2d 127, 26 Cal Rptr 601; *State v Gordon*, 197 Conn 413, 497 A2d 965, later proceeding 504 A2d 1020; *Colbert v United States* (Dist Col App) 471 A2d 258; *State v Polson*, 81 Idaho 147, 339 P2d 510; *State v Johnson* (La) 438 So 2d 1091; *State v Turner* (Mo) 320 SW2d 579; *Shirey v State* (Okla Crim) 520 P2d 701; *Eckert v State* (Tex App Austin) 672 SW2d 600; *State v Hankish*, 147 W Va 123, 126 SE2d 42.

Annotations: 62 ALR2d 166 § 16.

ney for insisting on a right of his client is, however, deemed a serious error and usually calls for reversal of conviction.⁹⁸

The subject matter of the episode leading to berating or punishment of defense counsel, as well as the stage of the case at which it occurred, is often taken into account. If it takes place at a critical juncture of the trial,⁹⁹ the happening is regarded as more fraught with danger to the defendant than if the incident involved merely formal or routine matter.¹

■■■■ Observation: In a few decisions affirming conviction the courts have stressed that the judge, in reprimanding defense counsel, did not address or refer to the defendant.²

The decisions are in conflict as to whether it is reversible error for the judge to reflect adversely on defense counsel's intelligence and ability as a lawyer,³ but it is quite generally held to be reversibly erroneous for the judge unjustly to attack his good faith and integrity.⁴ However, an isolated questioning of the defense attorney's sincerity, there being no indication of hostility between him and the judge, has been held to be insufficient ground for disturbing a conviction.⁵

Once the conduct of the defendant's attorney makes it proper for the judge to reprimand or punish him, severity of treatment is held to be within the judge's sound discretion,⁶ although the attorney should not be held up to ridicule or obloquy and the defendant's cause should not be prejudiced.⁷

§ 317. —Censure or punishment of counsel

When counsel is properly admonished by the court, the mere fact that such comments were directed at him does not demonstrate prejudice on the part of the court.⁸ The general atmosphere of the courtroom at the time of the judge's rebuke of counsel is an important factor in determining the harm

98. *People v Bedard*, 11 Ill 2d 622, 145 NE2d 54; *People v Rodriguez* (2d Dept) 32 App Div 2d 545, 299 NYS2d 632, app dismd 25 NY2d 785, 303 NYS2d 531, 250 NE2d 587.

Annotations: 62 ALR2d 166 § 17.

99. *Fuller v State*, 217 Ark 679, 232 SW2d 988; *People v Coli*, 2 Ill 2d 186, 117 NE2d 777.

1. *United States v Leviton* (CA2 NY) 193 F2d 848, cert den 343 US 946, 96 L Ed 1350, 72 S Ct 860, reh den 343 US 988, 96 L Ed 1375, 72 S Ct 1079.

2. *United States v Boatner* (CA2 NY) 478 F2d 737, cert den 414 US 848, 38 L Ed 2d 96, 94 S Ct 136; *Commonwealth v England*, 474 Pa 1, 375 A2d 1292; *Commonwealth v Marvel*, 271 Pa Super 11, 411 A2d 1254; *State v Wright*, 271 SC 534, 248 SE2d 490; *State v Lyskoski*, 47 Wash 2d 102, 287 P2d 114; *State v Smith*, 158 W Va 663, 212 SE2d 759 (ovrld on other grounds by *State ex rel. White v Mohn*, 168 W Va 211, 283 SE2d 914).

Annotations: 62 ALR2d 166 § 19.

3. *Sawyer v United States*, 202 US 150, 50 L Ed 972, 26 S Ct 575; *United States v Dellinger*

(CA7 Ill) 472 F2d 340, 22 ALR Fed 159, cert den 410 US 970, 35 L Ed 2d 706, 93 S Ct 1443; *Dutton v State* (Del Sup) 452 A2d 127; *Watkins v United States* (Dist Col App) 379 A2d 703; *Eager v State*, 205 Tenn 156, 325 SW2d 815.

Annotations: 62 ALR2d 166 § 20.

4. *United States v Spears* (CA7 Ill) 558 F2d 1296; *Kraft v United States* (CA8 Minn) 238 F2d 794; *Davis v State*, 242 Ark 43, 411 SW2d 531; *People v De Jesus*, 42 NY2d 519, 399 NYS2d 196, 369 NE2d 752; *Kincade v State* (Tex Crim) 552 SW2d 832.

Annotations: 62 ALR2d 166 § 21[b].

5. *Nix v State*, 20 Okla Crim 373, 202 P 1042, 26 ALR 1053.

Annotations: 62 ALR2d 166 § 21[c].

6. *Bryant v State*, 207 Md 565, 115 A2d 502.

Annotations: 62 ALR2d 166 § 22.

7. *State v Rutten*, 73 Idaho 25, 245 P2d 778.

Annotations: 62 ALR2d 166 § 22.

8. *People v Brown* (1st Dist) 87 Ill App 3d 368, 42 Ill Dec 586, 409 NE2d 81.

done.⁹ In order to determine whether the remarks of the judge slipped by virtually unnoticed or were, instead, the turning point of the trial, the entire record must be carefully considered.¹⁰ Criticism is more easily held prejudicial when the case is close,¹¹ but is not prejudicial when the judgment rendered was the only one possible.¹²

When counsel for both sides have shared equally in the judge's disparagement, prejudicial error is less likely to have occurred than when the treatment of opposing counsel has been different.¹³ Criticisms of counsel which might otherwise have been prejudicial have sometimes been justified because a long and arduous trial made natural and human outbursts by the judge excusable.¹⁴ In the final analysis, whether criticism of counsel amounts, under the facts presented in particular cases, to reversible error is a question requiring the appellate court to examine what was said by the trial judge, and the circumstances existing at the time of the criticism. The latter factor has as its most important aspect the conduct of counsel which provoked or gave rise to the criticism.¹⁵ Criticism or rebuke of counsel by the judge is not prejudicial when justified by counsel's improper conduct in the examination of witnesses.¹⁶

C. CURE OF ERROR [§§ 318-320]

§ 318. Generally

Error in expressing an opinion as to the weight of evidence or in making other improper remarks has been held not to be cured by instruction, on the theory that the jury may have been influenced and that the impression made could not be eradicated by any explanation, or even by a withdrawal, of the objectionable word or statement.¹⁷ However, it has also been held that,

9. Ward v Hopkins (Fla) 81 So 2d 493.

Annotations: Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 ALR2d 826 § 13.

10. Martin v Pacific Gas & Electric Co. (3rd Dist) 204 Cal App 2d 316, 22 Cal Rptr 291; Howard v Jones Store Co., 123 Kan 620, 256 P 1019, 53 ALR 139; Kamen Soap Products Co. v Prusansky & Prusansky, Inc. (1st Dept) 11 App Div 2d 676, 201 NYS2d 875.

Annotations: 94 ALR2d 826 § 11.

11. Day v Thomson, 305 Ill App 29, 26 NE2d 429; Pilgeram v Haas, 118 Mont 431, 167 P2d 339.

Annotations: 94 ALR2d 826 § 12[b].

12. Ward v Hopkins (Fla) 81 So 2d 493; Fortier v Ritter's Hairdressing Studios, Inc., 282 Minn 382, 164 NW2d 897; Trinity Universal Ins. Co. v Jolly (Tex Civ App Austin) 307 SW2d 843, writ ref n re; Swonger v Celentano, 17 Wis 2d 303, 116 NW2d 117.

Annotations: 94 ALR2d 826 § 12[b].

13. Forest Preserve Dist. v Wike, 3 Ill 2d 49, 119 NE2d 734; Nicholson v Blanchette, 239 Md 168, 210 A2d 732, 14 ALR3d 525, supp op 239 Md 188, 213 A2d 71, 14 ALR3d 539 and

(ovrld on other grounds by Deems v Western M.R. Co., 247 Md 95, 231 A2d 514); Mercer v Millers' Mut. Fire Ins. Ass'n. (Mo) 249 SW2d 402.

Annotations: 94 ALR2d 826 § 14.

14. Fowler v Shaw, 119 Kan 576, 240 P 970; Wiseman v Skagit County Dairymen's Ass'n, 172 Wash 95, 19 P2d 662.

Annotations: 94 ALR2d 826 § 18.

15. Skelton v Beall (Fla App D3) 133 So 2d 477, 94 ALR2d 820 (further holding that it was reversible for the trial judge, after a rebuke of counsel which was in itself error, to say, "Every time I try a case with you, this occurs. Every time. You're at least consistent.").

16. Aaron v Hampton Motors, Inc., 240 SC 26, 124 SE2d 585; Pirrung v T. & N.O.R. Co. (Tex Civ App Houston (14th Dist)) 350 SW2d 50.

17. Myers v George (CA8 Iowa) 271 F2d 168, 83 ALR2d 1121; State v Rogers, 173 NC 755, 91 SE 854; Boyd v Portland General Electric Co., 40 Or 126, 66 P 576 (ovrld on other grounds by Ritchie v Thomas, 190 Or 95, 224 P2d 543).

Annotations: Prejudicial effect of remarks of

assuming that a trial judge's criticism of counsel amounts to prejudicial error, the prejudice may be erased by curative action of various kinds.¹⁸ Thus, inadvertent remarks accompanying rulings made may be cured by an instruction to the effect that the jury are the judges of the weight of the evidence and of the credibility of witnesses.¹⁹

Whether error committed by the trial judge in disparaging a litigant may be cured by an admonition to the jury to disregard such remarks depends upon all the circumstances, including the nature of the particular remarks, the test being whether in a particular case the injurious effects of the remarks upon the minds of the jury can be erased by such an instruction.²⁰

§ 319. Harsh treatment of defense counsel in criminal cases

On rare occasions and in special circumstances, conviction has been affirmed on the ground that although the judge erred in his treatment of the accused's attorney, the defense had a way open to avoid the prejudicial consequences of the error.²¹ It has been held that the judge's cautionary or explanatory instruction or admonition prevented or erased prejudice in the jury flowing from his criticism or punishment of the defendant's lawyer.²² However, strictures may be so severe and epithets so degrading that another trial is the least measure that will repair the damage.²³

trial judge criticizing counsel in civil case, 94 ALR2d 826 §§ 29[a], 30[b].

Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging the litigants, the witnesses, or the subject matter of the litigation, 83 ALR2d 1128 § 4.

18. *Haines v Powermatic Houdaille, Inc.* (CA8 Mo) 661 F2d 94, CCH Prod Liab Rep ¶ 9097; *Ward v Westland Plastics, Inc.* (CA9 Cal) 651 F2d 1266, 23 BNA FEP Cas 128, 23 CCH EPD ¶ 31093; *Globe Life & Acci. Ins. Co. v Still* (CA5 Ga) 376 F2d 611; *Kane v American Tankers Corp.* (CA2 NY) 219 F2d 637; *Grimes v Walker*, 286 Ala 555, 243 So 2d 664; *White v New Hampshire Ins. Co.*, 227 Kan 293, 607 P2d 43; *Plains Transport of Kansas, Inc. v Baldwin*, 217 Kan 2, 535 P2d 865; *R.H. White Realty Co. v Boston Redevelopment Authority*, 3 Mass App 505, 334 NE2d 637; *Saintsing v Taylor*, 57 NC App 467, 291 SE2d 880, petition den 306 NC 558, 294 SE2d 224.

Annotations: 94 ALR2d 826 §§ 28, 29[b], c], 30[a].

19. *Birmingham Fire Ins. Co. v Pulver*, 126 Ill 329, 18 NE 804; *Runels v Lowell Sun Co.*, 318 Mass 466, 62 NE2d 121; *Batchoff v Craney*, 119 Mont 157, 172 P2d 308 (superseded by statute on other grounds as stated in *Re Goldman*, 179 Mont 526, 588 P2d 964).

Annotations: 83 ALR2d 1128 § 4.

Forms: Instruction to jury to disregard court's intimation of opinion as to facts. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 249.

20. *Haines v Powermatic Houdaille, Inc.* (CA8 Mo) 661 F2d 94, CCH Prod Liab Rep ¶ 9097;

Globe Life & Acci. Ins. Co. v Still (CA5 Ga) 376 F2d 611 (remarks not prejudicial); *White v New Hampshire Ins. Co.*, 227 Kan 293, 607 P2d 43; *Plains Transport of Kansas, Inc. v Baldwin*, 217 Kan 2, 535 P2d 865; *Wilborg v Denzell*, 359 Mass 279, 268 NE2d 855; *Sorrentino v Graziano*, 341 Pa 113, 17 A2d 373 (error in making disparaging remarks not cured by instruction to disregard).

Annotations: 83 ALR2d 1128 § 4.

21. *People v Watson*, 57 Cal App 85, 206 P 648; *Saulsbury v State*, 83 Okla Crim 7, 172 P2d 440.

Annotations: Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166 § 35.

22. *United States v Baresh* (CA5 Tex) 790 F2d 392, 20 Fed Rules Evid Serv 1035; *United States v Tuchow* (CA7 Ill) 768 F2d 855, 18 Fed Rules Evid Serv 699; *United States v King* (CA6 Tenn) 415 F2d 737, cert den 396 US 974, 24 L Ed 2d 443, 90 S Ct 465; *Carter v United States* (CA9 Cal) 373 F2d 911, 67-1 USTC ¶ 9260; *Muhammed v State*, 27 Ark App 188, 769 SW2d 33, cert den (US) 107 L Ed 2d 101, 110 S Ct 142; *State v Messier*, 16 Conn App 455, 549 A2d 270, app den 209 Conn 829, 552 A2d 1216; *Solar v United States* (Mun Ct App Dist Col) 94 A2d 34, 35 ALR2d 1039 (counsel accused of asking "trick" question); *Commonwealth v Nicholson*, 308 Pa Super 370, 454 A2d 581.

Annotations: 62 ALR2d 166 § 36.

23. *Zebouni v United States* (CA5 Fla) 226

§ 320. Violation of “Griffin Rule”

Although some cases have held that remedial action by the trial judge was sufficient to cure any potential prejudice which might have resulted from an error consisting of his violating the Griffin Rule by his comments on the accused’s failure to testify,²⁴ other cases have held that such an error either was not cured or was not even curable.²⁵

V. PRESENTATION AND RECEPTION OF EVIDENCE [§§ 321–489]

A. IN GENERAL [§§ 321–353]

Research References

- ALR Digest to 3d, 4th, and Federal, Appeal and Error §§ 312, 313, 321, 376; Criminal Law §§ 112, 121; Trial §§ 8, 13, 16
- Index to Annotations, Documentary Evidence; Evidence; Fair and Impartial Trial; Jury and Jury Trial; Trial; Witnesses
- 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 75
- 8 Am Jur Proof of Facts 153, Motion Pictures as Evidence; 9 Am Jur Proof of Facts 147, Photographs as Evidence; 44 Am Jur POF2d 707, Foundation for Admission of Map, Diagram, or Chart
- 2 Am Jur Trials 669, Preparing and Using Maps; 3 Am Jur Trials 377, Preparing and Using Models; 3 Am Jur Trials 507, Preparing and Using Diagrams; 5 Am Jur Trials 285, Opening Statements—Plaintiff’s View; 5 Am Jur Trials 305, Opening Statements—Defense View
- 12 Federal Procedure, L Ed, Evidence §§ 33:102-33:255, 33:481-33:527; 33 Federal Procedure, L Ed, Trial §§ 77:10-77:14
- Bailey & Rothblatt, Investigation and Preparation of Criminal Cases (1985) §§ 9:1-10:24, 31:1-31:14
- Carlson, Successful Techniques for Civil Trial (1983) §§ 2:33, 3:1, 3:34, 4:20
- Danner & Toothman, Trial Practice Checklists (1989) §§ 5:70, 7:30, 7:50, 7:60, 8:70, 8:80, 8:140, 8:160, 8:180
- Purver, Young, Davis & Kerper, The Trial Lawyer’s Book: Preparing and Winning Cases (1990) §§ 8:15, 11:3, 15:3, 15:6-15:9

1. DISCRETION OF COURT [§§ 321–327]

§ 321. Reception of evidence, generally

The admission or exclusion of evidence is initially left to the discretion of the trial court, which must determine its relevancy and possible prejudicial

F2d 826; Moore v State, 147 Neb 390, 23 NW2d 552.

Annotations: 62 ALR2d 166 § 36.

24. Crawford v State (Del Sup) 245 A2d 791.

As to the Griffin Rule, generally, see § 307.

Annotations: Violation of federal constitutional rule (Griffin v California) prohibiting adverse comment by prosecutor or court upon accused’s failure to testify, as constituting reversible or harmless error, 24 ALR3d 1093 (§ 10 superseded by Failure to object to improper questions or comments as to defend-

ant’s pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases, 32 ALR4th 774) §§ 5, 12[a].

25. Schultz v Yeager (DC NJ) 293 F Supp 794, affd (CA3 NJ) 403 F2d 639, cert den 394 US 961, 22 L Ed 2d 562, 89 S Ct 1309.

As to instructions on an accused’s failure to testify, see §§ 1309 et seq.

As to instructions on a party’s failure to testify, see § 1308.

Annotations: 24 ALR3d 1093 § 12[b].

effects.²⁶ However, evidence with a capacity for unfair prejudice cannot be equated with testimony adverse to the opposing party, since evidence is only material if it is prejudicial in some relevant respect.²⁷

The rules for the introduction of evidence must often be applied or relaxed according to circumstances apparent only to the court engaged in conducting the trial, and where the introduction of evidence is confided to the trial court's discretion, it should not be exercised by arbitrary strictness nor by indulgence and relaxation.²⁸ Strict uniformity at all times is not to be expected, and in some instances would prove unjust.²⁹

The court has a duty to confine the evidence to points in issue so that the jury is not distracted from the main issues and directed to extraneous matters.³⁰ Thus, a court cannot be called upon to admit irrelevant, impertinent, incompetent, or immaterial statements,³¹ and must take care that the evidence on which it shall be called upon to act is legal and relevant to the issue on behalf of either the plaintiff or the defendant.³²

The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.³³ However, the correctness of a ruling on evidence is to be determined by the situation as presented to the court when the evidence was offered.³⁴

■■■■ Reminder: Evidence rules control the the admission or exclusion of evidence at trial. The Federal Rules of Evidence are the primary source of evidence law, but there is also a common law of evidence, state rules sometimes apply, and additional evidence rules may be imposed by statute. Counsel should always consult current state statutes or court rules in the applicable jurisdiction. Although most states follow evidence rules that are similar to the federal rules, each state's rules may have important differences imposed by statute, rule, or common law.³⁵

26. *Tandy Corp. v Bone*, 283 Ark 399, 678 SW2d 312, 52 ALR4th 839; *State v Conlogue (Me)* 474 A2d 167, 43 ALR4th 1189; *Wright v Forney*, 233 Neb 258, 444 NW2d 895.

As to rules of admissibility and the relevancy, materiality, and competency of evidence, see 29 Am Jur 2d, Evidence §§ 249 et seq.

Practice References: Relevancy of evidence in federal court actions. 12 Federal Procedure, L Ed, Evidence §§ 33:102-33:255.

27. *Kaeo v Davis*, 68 Hawaii 447, 719 P2d 387.

28. *Epstein v Denver*, 133 Colo 104, 293 P2d 308, 55 ALR2d 783; *Thompson v American Steel & Wire Co.*, 317 Pa 7, 175 A 541; *Re Estate of Baxter*, 16 Utah 2d 284, 399 P2d 442, 17 ALR3d 700.

29. *Thompson v American Steel & Wire Co.*, 317 Pa 7, 175 A 541.

30. *Gulley v State (Ala App)* 342 So 2d 1362.

31. *County of Macon v Shores*, 97 US 272, 24 L Ed 889; *Storm v United States*, 94 US 76, 24

L Ed 42; *Lucas v Brooks*, 85 US 436, 21 L Ed 779; *Roach v Hulings*, 41 US 319, 10 L Ed 979; *Peckham v Family Loan Co. (CA5 Fla)* 262 F2d 422, cert den 361 US 824, 4 L Ed 2d 68, 80 S Ct 70.

32. *Roach v Hulings*, 41 US 319, 10 L Ed 979; *Peckham v Family Loan Co. (CA5 Fla)* 262 F2d 422, cert den 361 US 824, 4 L Ed 2d 68, 80 S Ct 70.

33. *Richardson v Colonial Life & Acci. Ins. Co. (Mo App)* 723 SW2d 912.

34. *T. Barbour Brown & Co. v Canty*, 115 Conn 226, 161 A 91, 83 ALR 801; *State v Reynolds*, 41 NJ 163, 195 A2d 449, 1 ALR3d 1438, cert den 377 US 1000, 12 L Ed 2d 1050, 84 S Ct 1930, reh den 379 US 873, 13 L Ed 2d 80, 85 S Ct 22 and cert den 377 US 1000, 12 L Ed 2d 1050, 84 S Ct 1934, reh den 379 US 873, 13 L Ed 2d 81, 85 S Ct 23.

35. **Practice References:** *Danner & Toothman, Trial Practice Checklists (1989)* § 8:70.

As to the taking of evidence in federal

§ 322. —In criminal cases

The Federal Constitution leaves state trial judges wide latitude to exclude evidence that is repetitive or only marginally relevant, or that poses an undue risk of harassment, prejudice, or confusion of the issues, and the United States Supreme Court is reluctant to impose constitutional constraints on ordinary evidentiary rulings in criminal cases by state trial courts.³⁶

Where a criminal prosecution is based on circumstantial evidence, the court has a wide discretion in the reception of evidence.³⁷ A serious doubt as to the admissibility of evidence in a criminal case should be resolved in favor of the accused.³⁸ While all evidence offered should be relevant to some issue in the case and have a material bearing upon it, the court should not exclude evidence in a criminal case because it is weak,³⁹ because it is gruesome,⁴⁰ or because of the possibility of its being false.⁴¹

§ 323. Effect of opening statement

The opening statement of counsel generally is only an outline or a brief summary of anticipated proof.⁴² Thus, a trial court may not exclude evidence of facts which are properly put in issue by the pleadings, because of a failure to make reference in opening statement to the intention to prove such facts.⁴³

■■■■ Observation: Even though the opening statement is only an outline of the proof to be presented, opposing counsel may object to statements made in the opening statement. Reference to inadmissible evidence and argument of the facts are objectionable and may in severe cases result in a mistrial.⁴⁴

Even if no opening statement is made, a party is entitled to introduce evidence and prove a cause of action, or to defend against evidence tending to sustain a cause of action, and where an opening statement is made, a party is not confined in the introduction of evidence to the statement made in the opening.⁴⁵

courts, generally, see 33 Federal Procedure, L Ed, Trial §§ 77:10-77:14.

For a comparison of state court evidence rules to the federal rules of procedure and evidence, see Am Jur 2d Desk Book, Item 126, pp. 406 et seq.

36. *Crane v Kentucky*, 476 US 683, 90 L Ed 2d 636, 106 S Ct 2142, 20 Fed Rules Evid Serv 801, on remand (Ky) 726 SW2d 302, cert den 484 US 834, 98 L Ed 2d 70, 108 S Ct 111, habeas corpus proceeding (WD Ky) 708 F Supp 163, affd (CA6 Ky) 889 F2d 715, cert den (US) 107 L Ed 2d 1070, 110 S Ct 1168.

37. 29 Am Jur 2d, Evidence § 266.

38. *Gambrell v State*, 92 Miss 728, 46 So 138.

As to admissibility of evidence in criminal cases, generally, see 29 Am Jur 2d, Evidence §§ 266, 278-293, 320-333.

39. *Baker v State*, 86 Neb 775, 126 NW 300.

40. *Whitehead v State* (Ind) 511 NE2d 284, 71 ALR4th 173, cert den 484 US 1031, 98 L

Ed 2d 773, 108 S Ct 761; *State v Pascoe* (Utah App) 774 P2d 512, 108 Utah Adv Rep 59.

41. *Scott v O'Brien*, 129 Ky 1, 110 SW 260.

42. §§ 513 et seq.

43. *Butler v National Home for Disabled Volunteer Soldiers*, 144 US 64, 36 L Ed 346, 12 S Ct 581.

For discussion of opening statements, including their purpose and scope, see §§ 515 et seq.

As to the object of pleadings, and the necessity of adducing evidence thereunder, see 61A Am Jur 2d, Pleading §§ 3, 139, 179, 363, 364.

44. **Practice References:** *Danner & Toothman*, Trial Practice Checklists (1989) § 8:80.

45. *Butler v National Home for Disabled Volunteer Soldiers*, 144 US 64, 36 L Ed 346, 12 S Ct 581; *Wilkey v State*, 238 Ala 595, 192 So 588, 129 ALR 549; *Pietsch v Pietsch*, 245 Ill 454, 92 NE 325; *Perry v Hannagan*, 257 Mich 120, 241 NW 232, 79 ALR 1127.

Practice References: 5 Am Jur Trials 285,

§ 324. Conditional reception of evidence

It is within the discretion of the trial judge to permit the introduction of evidence which depends for its admissibility in some preliminary showing upon counsel's assurance that such showing will be forthcoming.⁴⁶ While the practice has sometimes been condemned,⁴⁷ it is generally recognized that where evidence is not admissible at the time it is offered, but may be made so by proof of other facts which counsel states he intends to prove, it may be received conditionally, subject to being ruled out if the connecting evidence is not supplied.⁴⁸ Where the admissibility of testimony depends upon the determination of some prior fact by the court, the prior fact need not be established by conclusive evidence so long as there is enough evidence to make it proper to submit the whole evidence to the jury.⁴⁹ Failure to receive evidence under such circumstances is an error.⁵⁰

The purpose of the evidence and the nature of the connection to be proved must be stated to the court.⁵¹

If evidence is introduced, over objection that it is irrelevant, upon the theory that its relevancy may be shown by subsequent evidence, and if such evidence is not subsequently introduced, the court may exclude the irrelevant evidence on its own motion.⁵² A necessary connection not supplied and the admission of evidence likely to prejudice the jury may be sufficient to require a new trial, although no motion was made to strike the evidence.⁵³

§ 325. —Practice guide

Many professional witnesses ask to be allowed to testify out of order due to busy schedules. The common practice, involving both professional courtesy among lawyers and efficient operations of the court, demands some flexibility to accommodate scheduling.⁵⁴ Thus, judges may admit evidence, even though

Opening Statements—Plaintiff's View; 5 Am Jur Trials 305, Opening Statements—Defense View.

46. *State v Lewis*, 298 NC 771, 259 SE2d 876.

47. *Fuller v Knights of Pythias*, 129 NC 318, 40 SE 65.

48. *First Unitarian Soc. v Faulkner*, 91 US 415, 23 L Ed 283; *Copper Process Co. v Chicago Bonding & Ins. Co.* (CA3 Pa) 262 F 66, 8 ALR 1477; *Exchange State Bank v Occident Elevator Co.*, 95 Mont 78, 24 P2d 126, 90 ALR 740.

The trial court did not err in permitting a State's witness to testify that she had called a police officer before it was established that there was a need for a police officer to come to her residence, since the trial court has the discretion to permit the introduction of evidence which depends for its admissibility upon counsel's assurance that such showing will be forthcoming. *State v Lewis*, 298 NC 771, 259 SE2d 876.

For discussion of proof precedent to the admission of evidence as a factor in the order of proof, see § 354.

Practice References: Conditional admission of evidence. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof § 36.

—Eliciting testimony subject to connection. 5 Am Jur Trials 611, Presenting Plaintiff's Case § 25.

49. *Spanfelner v Meyer*, 51 Cal App 2d 390, 124 P2d 862; *State v Hyde*, 234 Mo 200, 136 SW 316.

50. *Re Goldthorp's Estate*, 94 Iowa 336, 62 NW 845.

51. *Jones v St. Louis, I.M. & S.R. Co.*, 53 Ark 27, 13 SW 416; *Deitz v Providence Washington Ins. Co.*, 33 W Va 526, 11 SE 50.

As to offers of proof, generally, upon objection to the introduction of evidence, see §§ 436 et seq.

52. 29 Am Jur 2d, Evidence § 254.

53. *Root v Kansas C.S.R. Co.*, 195 Mo 348, 92 SW 621.

54. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 14:2.

it is out of order and as yet unconnected to the case, subject to counsel's assurance that the evidence will be tied in at a later date.⁵⁵

Where objection is made to evidence which may be admitted conditionally, the procedure includes the court's (1) reserving its ruling on the objection, or (2) admitting the evidence subject to a later motion to strike.⁵⁶ The procedure for conditionally admitting evidence subject to a later motion to strike is well within the court's discretion and, finding no abuse of discretion, the court's provisional admission of evidence will be upheld.⁵⁷

■■■■ **Caution:** Some judges, in admitting evidence over objection and making it subject to a later motion to strike, state at that time that the motion to strike is considered to be already made. Other judges require the objecting party to make the motion to strike later in the trial,⁵⁸ and where a later motion to strike is required, failure to make the motion may constitute a waiver of the objection to the evidence.⁵⁹

§ 326. Withdrawal of evidence to cure error

The trial court, if on reflection it believes that it has committed error in admitting evidence, may withdraw or permit the withdrawal of the evidence from the jury, instruct them to disregard it, and thus cure the error.⁶⁰ The withdrawal of evidence which has been offered constitutes a waiver of any error in rejecting it.⁶¹

Evidence which is relevant and material, and which has been admitted without objection, should not be withdrawn from the jury although a good objection could have been made.⁶² The degree of improbability in testimony authorizing its withdrawal from a jury must be so great as to amount, approximately at least, to an impossibility.⁶³

The right to withdraw evidence is not defeated by the fact that the party against whom the evidence was admitted is put at a disadvantage by evidence he introduced to meet the evidence which is withdrawn.⁶⁴ But, it is an abuse of discretion for the trial court to reverse its ruling on admission of exhibits into evidence after the close of the trial and at a time when the party relying on such exhibits had no opportunity to furnish the necessary supporting data.⁶⁵

55. § 414.

56. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 14:2.

As to motions to strike for failure to connect conditionally admitted evidence, see § 474.

57. *United States v Zemek* (CA9 Wash) 634 F2d 1159, 7 Fed Rules Evid Serv 216, cert den 450 US 916, 67 L Ed 2d 341, 101 S Ct 1359 and cert den 450 US 985, 67 L Ed 2d 821, 101 S Ct 1525 (co-conspirator's statements).

As to the necessity of a motion to strike where connecting evidence is not supplied, see § 474.

58. § 476.

59. § 474.

60. *Specht v Howard*, 83 US 564, 21 L Ed 348; *American Workmen v Ledden*, 196 Ark

902, 120 SW2d 346, 120 ALR 201; *Maas v Laursen*, 219 Minn 461, 18 NW2d 233, 158 ALR 215; *Mahany v Kansas City R. Co.* (Mo) 254 SW 16, 29 ALR 817.

61. § 423.

62. *Western Union Tel. Co. v Merritt*, 55 Fla 462, 46 So 1024.

63. *Austin v Washington Water Power Co.*, 68 Wash 508, 123 P 775.

As to evidence manifestly or inherently untrue, incredible, or contrary to physical facts, see 30 Am Jur 2d, Evidence § 1085.

64. *Alabama G.S.R. Co. v Burgess*, 119 Ala 555, 25 So 251.

65. *Automatic Control Products Corp. v Tel-Tech, Inc.* (Utah) 780 P2d 1258, 119 Utah Adv Rep 3.

§ 327. —Sufficiency of withdrawal

Notwithstanding a withdrawal of evidence, the form of the withdrawal may not be sufficient to cure the error.⁶⁶ For instance, a withdrawal which is not accompanied by an instruction to disregard is not sufficient.⁶⁷ Where evidence which is calculated to arouse the sympathy of the jury is admitted, its withdrawal with an instruction to disregard does not cure the error.⁶⁸

2. LIMITATION OF NUMBER AND TESTIMONY OF WITNESSES [§§ 328–344]

a. IN GENERAL [§§ 328–331]

§ 328. Discretion and duty of court; effect of statute

The trial court's discretion in conducting the trial includes the order of presentation of witnesses,⁶⁹ the scope,⁷⁰ extent,⁷¹ manner,⁷² and mode of examination,⁷³ the admissibility of a witness' testimony,⁷⁴ and whether that witness is brought in rebuttal or as one that was not listed on the pretrial order.⁷⁵

The extent to which a party may present evidence on a particular issue is largely within the discretion of the trial court.⁷⁶ Because the court has a duty to move the testimony expeditiously along,⁷⁷ limiting the time allowed for the

66. *Throckmorton v Holt*, 180 US 552, 45 L Ed 663, 21 S Ct 474; *Washington Gas Light Co. v Lansden*, 172 US 534, 43 L Ed 543, 19 S Ct 296; *United States v Gilmore*, 74 US 491, 19 L Ed 282.

67. *Hepler v Santerno*, 244 Or 246, 417 P2d 390.

For discussion of instructions to the jury limiting or excluding consideration of evidence, generally, see §§ 1281 et seq.

As to the presumption that the jury followed an instruction to disregard evidence, see 5 Am Jur 2d, Appeal and Error § 890.

68. *Brown Land Co. v Lehman*, 134 Iowa 712, 112 NW 185; *Steubing's Adm'r v J.C. Fisel Transfer Co.*, 254 Ky 509, 71 SW2d 1040; *Bullock v State*, 65 NJL 557, 47 A 62.

69. § 354.

70. *Catina v Maree*, 272 Pa Super 247, 415 A2d 413, revd 498 Pa 443, 447 A2d 228.

71. *People v Boyce* (1st Dist) 51 Ill App 3d 549, 9 Ill Dec 403, 366 NE2d 914; *Catina v Maree*, 272 Pa Super 247, 415 A2d 413, revd 498 Pa 443, 447 A2d 228; *Stauffer Chemical Co. v Curry* (Wyo) 778 P2d 1083, 10 UCCRS2d 342.

While the right to cross-examine the government's weaknesses is inherent in the defendant's Sixth Amendment right of confrontation, the extent of cross-examination with respect to

an appropriate subject of inquiry is within the sound discretion of the trial court. *Jones v United States* (Dist Col App) 516 A2d 513.

72. *Stauffer Chemical Co. v Curry* (Wyo) 778 P2d 1083, 10 UCCRS2d 342.

73. *Alford v State Farm Fire & Casualty Co.* (Ala) 496 So 2d 19.

For discussion of the court's discretion as to the order of cross-examination, generally, see § 354.

As to examination of witnesses, generally, and control by the court thereof, see 81 Am Jur 2d, Witnesses §§ 416 et seq.

74. § 321.

75. *Tracy v Parish of Jefferson* (La App 5th Cir) 523 So 2d 266, cert den (La) 530 So 2d 569, reconsideration den (La) 532 So 2d 141.

For discussion of the order of proof, see §§ 354 et seq.

As to the discretion of the court to allow rebuttal, including testimony of an undisclosed witness, see §§ 367 et seq.

76. *Davis v International Harvester Co.* (2d Dist) 167 Ill App 3d 814, 118 Ill Dec 589, 521 NE2d 1282, CCH Prod Liab Rep ¶ 11790, app den 122 Ill 2d 572, 125 Ill Dec 214, 530 NE2d 242 and app den 136 Ill Dec 583, 545 NE2d 107.

77. *Gulley v State* (Ala App) 342 So 2d 1362.

examination of witnesses⁷⁸ or the number of witnesses on a given point,⁷⁹ and stopping repetitions and irrelevant examinations, are matters necessarily confided to a trial judge, whose discretion in such matters will not be interfered with on appeal except in case of abuse.⁸⁰

Statutes which limit costs of witnesses to a certain number on a given point do not necessarily compel a limitation of witnesses on that point.⁸¹

78. *United States v Shelton* (CA10 Okla) 736 F2d 1397, cert den 469 US 857, 83 L Ed 2d 119, 105 S Ct 185, habeas corpus proceeding (CA10 Okla) 848 F2d 1485; *Loux v United States* (CA9 Wash) 389 F2d 911, cert den 393 US 867, 21 L Ed 2d 135, 89 S Ct 151 and cert den 393 US 869, 21 L Ed 2d 138, 89 S Ct 156; *Henson & Sons Coal Co. v Strickland*, 152 Ark 203, 238 SW 5, 21 ALR 328; *People v Cavanaugh*, 69 Cal 2d 262, 70 Cal Rptr 438, 444 P2d 110, cert den 395 US 981, 23 L Ed 2d 768, 89 S Ct 2139, reh den 396 US 870, 24 L Ed 2d 127, 90 S Ct 42; *Walters v Hitchcock*, 237 Kan 31, 697 P2d 847; *Powers v Kansas Power & Light Co.*, 234 Kan 89, 671 P2d 491, CCH Prod Liab Rep ¶9973; *Irrizary v New York* (1st Dept) 95 App Div 2d 713, 464 NYS2d 5; *State v Marlow*, 310 NC 507, 313 SE2d 532; *State v Welch*, 69 NC App 668, 318 SE2d 4; *State v Folk* (ND) 278 NW2d 410; *Commonwealth ex rel. Amoroso v Amoroso*, 212 Pa Super 94, 239 A2d 878; *State v Lee*, 203 SC 536, 28 SE2d 402, 149 ALR 1300; *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940; *State v Lambert* (Tenn Crim) 741 SW2d 127; *State v Reynolds* (Tenn Crim) 666 SW2d 476; *State v Brown* (W Va) 371 SE2d 609.

79. *United States v Shelton* (CA10 Okla) 736 F2d 1397, cert den 469 US 857, 83 L Ed 2d 119, 105 S Ct 185; *Loux v United States* (CA9 Wash) 389 F2d 911, cert den 393 US 867, 21 L Ed 2d 135, 89 S Ct 151 and cert den 393 US 869, 21 L Ed 2d 138, 89 S Ct 156; *Henson & Sons Coal Co. v Strickland*, 152 Ark 203, 238 SW 5, 21 ALR 328; *People v Cavanaugh*, 69 Cal 2d 262, 70 Cal Rptr 438, 444 P2d 110, cert den 395 US 981, 23 L Ed 2d 768, 89 S Ct 2139, reh den 396 US 870, 24 L Ed 2d 127, 90 S Ct 42; *Ritter v Jimenez* (Fla App D3) 343 So 2d 659; *People v Branch* (5th Dist) 158 Ill App 3d 338, 110 Ill Dec 695, 511 NE2d 872, app den 117 Ill 2d 546, 115 Ill Dec 403, 517 NE2d 1089; *Stone v State* (Ind App) 536 NE2d 534; *Walters v Hitchcock*, 237 Kan 31, 697 P2d 847; *Powers v Kansas Power & Light Co.*, 234 Kan 89, 671 P2d 491, CCH Prod Liab Rep ¶9973; *Irrizary v New York* (1st Dept) 95 App Div 2d 713, 464 NYS2d 5; *State v Marlow*, 310 NC 507, 313 SE2d 532; *State v Welch*, 69 NC App 668, 318 SE2d 4; *State v Jackson*, 30 NC App 187, 226 SE2d 543; *Board of Transp. v Eastern Developers & Rentals, Inc.*, 28 NC App 114,

220 SE2d 198; *State v Folk* (ND) 278 NW2d 410; *Fuhrman v Fuhrman* (ND) 254 NW2d 97; *Commonwealth ex rel. Amoroso v Amoroso*, 212 Pa Super 94, 239 A2d 878; *State v Lee*, 203 SC 536, 28 SE2d 402, 149 ALR 1300; *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940; *State v Lambert* (Tenn Crim) 741 SW2d 127; *State v Reynolds* (Tenn Crim) 666 SW2d 476; *State v Brown* (W Va) 371 SE2d 609.

As to the right of cross-examination, generally, see 81 Am Jur 2d, Witnesses § 464.

80. *Henson & Sons Coal Co. v Strickland*, 152 Ark 203, 238 SW 5, 21 ALR 328; *Yassin v Certified Grocers of Illinois, Inc.* (1st Dist) 150 Ill App 3d 1052, 104 Ill Dec 52, 502 NE2d 315, app den 114 Ill 2d 559, 108 Ill Dec 427, 508 NE2d 738; *Madisonville, H. & E.R. Co. v Thomas*, 140 Ky 143, 130 SW 975; *St. Louis, M. & S.E.R. Co. v Aubuchon*, 199 Mo 352, 97 SW 867.

The trial court can permit or refuse to permit cross-examination as it deems proper, even to the extent of excluding relevant testimony if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Stauffer Chemical Co. v Curry* (Wyo) 778 P2d 1083, 10 UCCRS2d 342.

As to cumulative evidence as a factor in the court's limitation of testimony, see § 337.

Annotations: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327 § 3[a].

Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 § 3.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 3[a].

Practice References: Right of court to limit number of witnesses. 2 Wharton's Criminal Evidence (13th ed) § 504.

Trial Witness Preparation. Danner & Toothman, Trial Practice Checklists (1989) § 7:30.

81. *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164.

For discussion of compensation and fees of witnesses, see 81 Am Jur 2d, Witnesses §§ 23-27.

§ 329. Notice to parties of limitation

The trial court should give notice in advance of its intention to limit the number of witnesses so that a party may determine which witnesses to call.⁸²

|||| Recommendation: Counsel's selection of witnesses will depend on the facts required to be proved and the range of possible witnesses available to offer such proof. Factors to be considered include: how the character of claims and defenses will affect particular testimony; the credibility and personality of the prospective witness; and the availability and desired order of testifying.⁸³

It sometimes is required that the trial court announce, with or without the parties' motion and before any witnesses on the point are offered, that a limitation of the witnesses upon the particular fact will be enforced, and a failure to do this is said to prevent the enforcement of any limitation.⁸⁴

Where the number of witnesses is to be limited as to the main point in issue or some material or controlling point, the limit should be announced at least before the introduction of any testimony on that point, in order that the parties may select their best witnesses.⁸⁵ A limitation in such a case is not an abuse of discretion, despite a claim that the witnesses not allowed to be called were more credible than those actually called, where the credibility of testifying witnesses was not attacked.⁸⁶

The fact that notice of an intention to limit the number of witnesses has been given does not preclude the court from hearing additional witnesses, in its discretion.⁸⁷ Thus, the court has discretion to allow the testimony of a witness whose existence was only ascertained on the morning of trial, despite an informal rule of court requiring disclosure of the identities of witnesses to the opposing counsel at least ten days prior to trial.⁸⁸ Similarly, no rule of law prevents a party from calling another witness when the witness originally relied on is precluded from testifying through no fault of the party calling him.⁸⁹

82. *Greene v Phoenix Mut. Life Ins. Co.*, 134 Ill 310, 25 NE 583; *St. Louis, M. & S.E.R. Co. v Aubuchon*, 199 Mo 352, 97 SW 867; *Board of Transp. v Eastern Developers & Rentals, Inc.*, 28 NC App 114, 220 SE2d 198; *Traders & General Ins. Co. v Russell* (Tex Civ App) 99 SW2d 1079, writ diss w o j.

Annotations: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327 § 8.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 8.

83. **Practice References:** *Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 11:3.

84. *United States v Gray* (CA5 La) 507 F2d 1013, 75-1 USTC ¶ 9231, 35 AFTR 2d 75-781, cert den 423 US 824, 46 L Ed 2d 40, 96 S Ct 38.

85. *United States v Gray* (CA5 La) 507 F2d 1013, 75-1 USTC ¶ 9231, 35 AFTR 2d 75-781, cert den 423 US 824, 46 L Ed 2d 40, 96 S Ct

38; *McConnell v Osage*, 80 Iowa 293, 45 NW 550.

Annotations: Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 § 8.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 8.

86. *State v Jackson*, 30 NC App 187, 226 SE2d 543.

87. *Brady v Shirley*, 18 SD 608, 101 NW 886.

88. *Roark v Dempsey*, 159 W Va 24, 217 SE2d 913.

Annotations: Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 ALR4th 712.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings, 58 ALR4th 653.

■■■■ *Recommendation:* Even where not required and although both attorneys know the witnesses the opponent intends to call well in advance of trial, counsel should, at the pretrial conference, give the judge a list of the witnesses expected to be called and thus get a commitment at the pretrial conference as to which witnesses the opponent intends to call.⁸⁰

§ 330. —Consent or exception of parties

The parties may consent to the limitation, and if they do so, they cannot allege error.⁸¹

If a party desires to except to a limitation of the number of witnesses, he should do so when the limitation is announced, and not after he has examined the limited number of witnesses.⁸²

§ 331. Practice guide: Trial preparation and witnesses

Successful trial preparation includes early notification of witnesses. Although a witness may be requested informally to appear, the only way to insure attendance at trial is to follow statutory subpoena procedures in the court where the action is venued.⁸³

■■■■ *Recommendation:* Counsel should keep a record of witness information, including names, telephone numbers, scheduled appearance times and alternate times available, and alternate witnesses to be called in case a scheduled witness fails to appear. When arranging the schedule of appearances, make sure that the witnesses have a way to reach you so that the clerk of the court is not deluged with scheduling questions.⁸⁴

b. FACTORS LIMITING DISCRETION [§§ 332-335]

§ 332. Regard for rights of parties, generally

The discretion to limit the number of witnesses a party may call should be exercised so as not to impair the rights of the parties,⁸⁵ and should not be so

80. State use of Miles v Brainin, 224 Md 156, 167 A2d 117, 88 ALR2d 1178.

90. *Practice References:* James S. Rogers, "Revising Outdated Trial Tactics," Trial (July 1989) p 73.

As to the requirement of opposing counsel to apprise each other of witnesses intended to be called at trial, see 81 Am Jur 2d, Witnesses § 4.

91. McConnell v Osage, 80 Iowa 293, 45 NW 550.

Annotations: Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 §§ 3[b], 17.

92. McConnell v Osage, 80 Iowa 293, 45 NW 550; Holliston Mills of Tennessee v McGuffin, 177 Tenn 1, 145 SW2d 1, reh dismd 177 Tenn 16, 146 SW2d 357; Meier v Morgan, 82 Wis 289, 52 NW 174.

Annotations: Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 3[a].

93. *Practice References:* Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) § 8:15.

94. *Practice References:* Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) § 8:15.

95. State v Thompson, 65 NJ Super 189, 167 A2d 410, 5 ALR3d 232.

Appeal record failed to demonstrate any prejudice or harmful error stemming from trial court's limiting number of before and after witnesses in automobile injury case to four. Ritter v Jimenez (Fla App D3) 343 So 2d 659.

In condemnation action, it was not error for trial judge to refuse landowner's request that one additional value witness be allowed to testify, where trial judge had stated that it was his practice to limit either side to three value witnesses and two value witnesses had already

arbitrary and unreasonable as to work injustice.⁹⁶

Because a court may not know of a party's intention as to the number of witnesses, it is not always proper for the judge to commit himself to such a fixed limit before hearing any of the witnesses,⁹⁷ or before the trial has commenced,⁹⁸ or during the examination of the first witness on that point.⁹⁹

§ 333. Materiality of testimony

The number of witnesses should not be limited as to the only¹ or main² issue, or as to a controlling³ or material⁴ fact, where the witnesses are not experts, and where the fact is controverted,⁵ even where a statute limits the number of witnesses whose costs may be taxed,⁶ except in cases of witnesses testifying directly to the existence or nonexistence of a fact.⁷

§ 334. —Collateral matters

It is proper to limit a party to fewer witnesses than would be allowable on a disputed point where a point is collateral,⁸ or not in dispute.⁹ For the purpose

testified, and where record did not show what witness would have said if permitted to testify. *Board of Transp. v Eastern Developers & Rentals, Inc.*, 28 NC App 114, 220 SE2d 198.

96. *United States v Gray* (CA5 La) 507 F2d 1013, 75-1 USTC ¶ 9231, 35 AFTR 2d 75-781, cert den 423 US 824, 46 L Ed 2d 40, 96 S Ct 38; *West Skokie Drainage Dist. v Dawson*, 243 Ill 175, 90 NE 377; *St. Louis, M. & S.E.R. Co. v Aubuchon*, 199 Mo 352, 97 SW 867; *Board of Transp. v Eastern Developers & Rentals, Inc.*, 28 NC App 114, 220 SE2d 198.

97. *United States v Gray* (CA5 La) 507 F2d 1013, 75-1 USTC ¶ 9231, 35 AFTR 2d 75-781, cert den 423 US 824, 46 L Ed 2d 40, 96 S Ct 38.

98. *Henson & Sons Coal Co. v Strickland*, 152 Ark 203, 238 SW 5, 21 ALR 328; *Shields v State*, 197 Tenn 83, 270 SW2d 367.

Annotations: Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 8.

99. *Henson & Sons Coal Co. v Strickland*, 152 Ark 203, 238 SW 5, 21 ALR 328.

1. *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940.

2. *Henson & Sons Coal Co. v Strickland*, 152 Ark 203, 238 SW 5, 21 ALR 328; *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940; *Traders & General Ins. Co. v Russell* (Tex Civ App) 99 SW2d 1079, writ diss w o j.

3. *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164; *Sulkowski v Zynda*, 160 Mich 7, 124 NW 536; *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940.

A trial court has no power to limit the number of witnesses of controlling facts, also known as occurrence witnesses. *People v Van*

Zile (4th Dist) 48 Ill App 3d 972, 6 Ill Dec 747, 363 NE2d 429.

4. *Henson & Sons Coal Co. v Strickland*, 152 Ark 203, 238 SW 5, 21 ALR 328; *West Skokie Drainage Dist. v Dawson*, 243 Ill 175, 90 NE 377.

Annotations: Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 § 6[c].

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 6[c].

5. *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164; *Traders & General Ins. Co. v Russell* (Tex Civ App) 99 SW2d 1079, writ diss w o j.

As to the discretion of the court to limit cumulative testimony on an issue, see § 340.

6. *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164; *Traders & General Ins. Co. v Russell* (Tex Civ App) 99 SW2d 1079, writ diss w o j.

7. *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164; *Greene v Phoenix Mut. Life Ins. Co.*, 134 Ill 310, 25 NE 583.

8. *Barfield v South Highland Infirmary*, 191 Ala 553, 68 So 30; *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940.

Annotations: Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 § 6[b].

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 6[b].

9. *Petersen v United States* (CA10 Utah) 268 F2d 87, 59-2 USTC ¶ 9538, 4 AFTR 2d 5109; *Marr v Marr* (4th Dist) 43 Ill App 2d 25, 192 NE2d 559; *Sturgeon v Clark*, 69 NM 132, 364 P2d 757.

of keeping the examination of witnesses on collateral issues within the bounds of reason and convenience, a court may exclude the testimony of witnesses to collateral matters,¹⁰ and exclude questions asked expert witnesses based on a state of facts finding no support in the evidence, although such questions are asked on cross-examination.¹¹

§ 335. Weight of evidence or burden of proof

While preponderance of evidence is not determined alone by the number of witnesses,¹² restricting witnesses to any given number on the respective sides might lead to a deadlock on the question of preponderance of evidence and cause the party having the burden to lose his case, when otherwise he might meet the requirements of the burden of proof simply by having a greater number of equally credible witnesses to the facts that control the issues involved.¹³ Ordinarily, the number of witnesses should not be limited where the point in dispute can be proved only inferentially.¹⁴

C. LIMITATION RESPECTING PARTICULAR EVIDENCE [§§ 336-344]

§ 336. Character evidence

It is within the discretion of the trial court to fix a reasonable limit upon the number of witnesses permitted to testify concerning the character or reputation of a party in a civil action,¹⁵ an accused,¹⁶ or even a third person.¹⁷

While it is true that the extent to which collateral matters may be made the subject of inquiry at trial is largely within the sound discretion of the trial judge, where identification is an important issue, the defendant in a criminal prosecution undoubtedly has the right to show that the victim's identification of him was unreliable. *Commonwealth v Jewett*, 392 Mass 558, 467 NE2d 155, 50 ALR4th 1039.

Annotations: 5 ALR3d 238 § 7; 5 ALR3d 169 § 7.

10. *Sloan v State*, 236 Mont 100, 768 P2d 1365.

11. § 341.

12. 30 Am Jur 2d, Evidence § 1088.

13. *Henson & Sons Coal Co. v Strickland*, 152 Ark 203, 238 SW 5, 21 ALR 328.

Annotations: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327 § 3[a].

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 3[a].

14. *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164; *Greene v Phoenix Mut. Life Ins. Co.*, 134 Ill 310, 25 NE 583.

Annotations: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327 § 3[a].

15. *Goggans v Winkley*, 159 Mont 85, 495

P2d 594; *Commonwealth ex rel. Davis v Malbon*, 195 Va 368, 78 SE2d 683.

Annotations: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327 § 5[a].

16. *United States v Benefield* (CA11 Ala) 889 F2d 1061; *U.S. v Garrett* (CA5 Tex) 720 F2d 1291; *United States v Watson* (CA11 Fla) 669 F2d 1374, 10 Fed Rules Evid Serv 31; *United States v Greenlee* (CA3 Pa) 517 F2d 899, 75-1 USTC ¶ 9488, 36 AFTR 2d 75-5048, cert den 423 US 985, 46 L Ed 2d 301, 96 S Ct 391 (defense in prosecution for failure to file tax returns limited to 13 character witnesses); *United States v Gray* (CA5 La) 507 F2d 1013, 75-1 USTC ¶ 9231, 35 AFTR 2d 75-781, cert den 423 US 824, 46 L Ed 2d 40, 96 S Ct 38 (defense in federal tax evasion prosecution was properly limited to 3 character witnesses); *United States v Jacobs* (CA5 Fla) 451 F2d 530, cert den 405 US 955, 31 L Ed 2d 231, 92 S Ct 1170, reh den 405 US 1049, 31 L Ed 2d 591, 92 S Ct 1309; *United States v Malinowski* (ED Pa) 347 F Supp 347, 73-1 USTC ¶ 9355, 31 AFTR 2d 73-523, affd (CA3 Pa) 472 F2d 850, 73-1 USTC ¶ 9199, 31 AFTR 2d 73-668, cert den 411 US 970, 36 L Ed 2d 693, 93 S Ct 2164; *Summerlin v State*, 256 Ind 652, 271 NE2d 411; *State v Marlow*, 310 NC 507, 313 SE2d 532; *State v Lambert* (Tenn Crim) 741 SW2d 127; *State v Reynolds* (Tenn Crim) 666 SW2d 476; *State v Brown* (W Va) 371 SE2d 609.

The trial court did not abuse its discretion in limiting the number of witnesses as to defen-

Although it is proper for a trial court to place reasonable limitations upon the number of witnesses allowed to testify with respect to the character or reputation as to a material, specific trait in both civil and criminal cases,¹⁸ a limitation on the number of witnesses giving testimony as to the character of a party or an accused is unauthorized where character is an important fact or issue in the case.¹⁹

§ 337. Cumulative evidence

The decision whether to admit evidence that is cumulative rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.²⁰

dant's good character to four, where there was no question as to defendant's previous reputation or good character, it being all but conceded by the state. *State v Demaree* (Mo) 362 SW2d 500, 17 ALR3d 312.

Annotations: 17 ALR3d 327 § 6[a].

17. *Giordano v Brandywine Granite Co.*, 19 Del 423, 52 A 332; *Cross v Commonwealth*, 270 Ky 537, 109 SW2d 1214.

As to evidence of the character or reputation of a witness, generally, and as used to impeach his credibility, see 81 Am Jur 2d, Witnesses § 563.

18. *Michelson v United States*, 335 US 469, 93 L Ed 168, 69 S Ct 213; *United States v Benefield* (CA11 Ala) 889 F2d 1061; *United States v Sullivan* (CA3 Pa) 803 F2d 87, 21 Fed Rules Evid Serv 1081, cert den 479 US 1036, 93 L Ed 2d 841, 107 S Ct 889; *U.S. v Garrett* (CA5 Tex) 720 F2d 1291; *United States v Watson* (CA11 Fla) 669 F2d 1374, 10 Fed Rules Evid Serv 31; *United States v Gray* (CA5 La) 507 F2d 1013, 75-1 USTC ¶9231, 35 AFTR 2d 75-781, cert den 423 US 824, 46 L Ed 2d 40, 96 S Ct 38; *United States v Jacobs* (CA5 Fla) 451 F2d 530, cert den 405 US 955, 31 L Ed 2d 231, 92 S Ct 1170, reh den 405 US 1049, 31 L Ed 2d 591, 92 S Ct 1309; *United States v Malinowski* (ED Pa) 347 F Supp 347, 73-1 USTC ¶9355, 31 AFTR 2d 73-523, affd (CA3 Pa) 472 F2d 850, 73-1 USTC ¶9199, 31 AFTR 2d 73-668, cert den 411 US 970, 36 L Ed 2d 693, 93 S Ct 2164; *Jones v State* (Ala App) 497 So 2d 215; *Stone v State* (Ind App) 536 NE2d 534; *State v Demaree* (Mo) 362 SW2d 500, 17 ALR3d 312; *State v Johnson* (Mo App) 721 SW2d 23; *Goggans v Winkley*, 159 Mont 85, 495 P2d 594; *State v Ramey*, 318 NC 457, 349 SE2d 566; *State v Marlow*, 310 NC 507, 313 SE2d 532; *State v Lambert* (Tenn Crim) 741 SW2d 127; *State v Reynolds* (Tenn Crim) 666 SW2d 476; *Commonwealth ex rel. Davis v Malbon*, 195 Va 368, 78 SE2d 683; *State v Brown* (W Va) 371 SE2d 609.

As to character or reputation of witnesses, generally, see 81 Am Jur 2d, Witnesses § 563.

Annotations: Propriety and prejudicial effect

of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327 §§ 4[b]-6[a].

19. *Julian v State*, 134 Ga App 592, 215 SE2d 496 (where prosecution relied on testimony of former narcotics officer and defendant relied largely on evidence of his good character, limiting character evidence to five witnesses and to less than 2 percent of total trial time was reversible error); *Traders & General Ins. Co. v Russell* (Tex Civ App) 99 SW2d 1079, writ dismissed.

As to the limitation of witnesses on controlling or material issues, generally, see § 333.

Annotation: 17 ALR3d 327 §§ 3[c], 5[b], 6[b].

20. *United States v Escamilla* (CA4 Va) 467 F2d 341; *Hurt v United States* (Dist Col App) 337 A2d 215; *Illinois State Toll Highway Authority v Grand Mandarin Restaurant, Inc.* (2d Dist) 189 Ill App 3d 355, 136 Ill Dec 370, 544 NE2d 1145, app den 129 Ill 2d 563, 140 Ill Dec 671, 550 NE2d 556; *Davis v International Harvester Co.* (2d Dist) 167 Ill App 3d 814, 118 Ill Dec 589, 521 NE2d 1282, CCH Prod Liab Rep ¶ 11790, app den 122 Ill 2d 572, 125 Ill Dec 214, 530 NE2d 242 and app den 136 Ill Dec 583, 545 NE2d 107; *Curl v McDonough Dist. Hospital* (3d Dist) 145 Ill App 3d 796, 99 Ill Dec 639, 495 NE2d 1374; *Jackson v Tyson* (La App 4th Cir) 526 So 2d 398; *Gormley v Grand Lodge of Louisiana* (La App 4th Cir) 503 So 2d 181, cert den (La) 506 So 2d 1227; *Da Foe v Michigan Brass & Electric Co.*, 175 Mich App 565, 438 NW2d 270; *Johnson v Ramsey County* (Minn App) 424 NW2d 800, 46 BNA FEP Cas 1686, 3 BNA IER Cas 629; *Molkenbur v Hart* (Minn App) 411 NW2d 249; *Gurnsey v Conklin Co.*, 230 Mont 42, 751 P2d 151; *Wright v Forney*, 233 Neb 258, 444 NW2d 895; *First Nat. Bank v Kurtz*, 232 Neb 254, 440 NW2d 432; *Cumming v Nielson's, Inc.* (App) 108 NM 198, 769 P2d 732; *Abbott v New Rochelle Hospital Medical Center* (2d Dept) 141 App Div 2d 589, 529 NYS2d 352, app den 72 NY2d 808, 534 NYS2d 666, 531 NE2d 298; *Swiontek v Ryder Truck Rental, Inc.*

■■■■ Observation: In the absence of such discretionary power, trials could be indefinitely prolonged, to the serious detriment of public interest.²¹

Accordingly, the court has discretion to restrict repetitious proof²² where time considerations substantially outweigh the incremental probative value of the proffered evidence,²³ where it is satisfied that further testimony will be of no assistance in arriving at a conclusion as to the truth of the issue,²⁴ or where the point in dispute has been thoroughly presented²⁵ on a single point or proposition of fact, in civil and criminal cases.²⁶

§ 338. —Exhibits as cumulative of testimony

The trial court may properly exclude from the evidence exhibits, even if

(ND) 432 NW2d 893; *Woods v Fruehauf Trailer Corp.* (Okla) 765 P2d 770, CCH Prod Liab Rep ¶11942; *Holley v Shepard* (Okla) 744 P2d 945; *Leaphart v Whiting Corp.*, 387 Pa Super 253, 564 A2d 165, app den (Pa) 577 A2d 890 and app den (Pa) 577 A2d 891.

21. *State v Lee*, 203 SC 536, 28 SE2d 402, 149 ALR 1300.

Annotations: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327 § 3[a].

Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 § 3.

22. *State v Shaw* (App) 90 NM 540, 565 P2d 1057; *State v Franks*, 300 NC 1, 265 SE2d 177; *West Rutland Trust Co. v Houston*, 104 Vt 204, 158 A 69, 80 ALR 664.

The trial court properly excluded the testimony of witnesses at a railroad crossing to the fact that 3 weeks after an accident, the warning signals were still inoperative, where an eyewitness to the accident was able to testify at trial that the warning lights at the crossing were not working at the time of the accident since their testimony was cumulative. *Thompson v United States Sugar Corp.* (Fla App D4) 548 So 2d 1171, 14 FLW 2154.

23. *Schneider v Cessna Aircraft Co.* (App) 150 Ariz 153, 722 P2d 321, CCH Prod Liab Rep ¶10743; *Kobos v Everts* (Wyo) 768 P2d 534, reh den (Wyo) 1989 Wyo LEXIS 64.

24. *Gypsum Carrier, Inc. v Handelsman* (CA9 Cal) 307 F2d 525, 4 ALR3d 517; *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164; *Patterson v Cushman* (Alaska) 394 P2d 657, 6 ALR3d 421; *Brazel v State*, 296 Ark 563, 759 SW2d 28; *Wesby v State* (Ind) 535 NE2d 133; *People v Brown* (1st Dist) 89 Ill App 3d 852, 45 Ill Dec 229, 412 NE2d 580; *State v Reynolds*, 41 NJ 163, 195 A2d 449, 1 ALR3d 1438, cert den 377 US 1000, 12 L Ed 2d 1050, 84 S Ct 1930, reh den 379 US 873, 13 L Ed 2d 80, 85 S Ct 22 and cert den 377 US 1000, 12 L Ed 2d 1050, 84 S Ct 1934, reh

den 379 US 873, 13 L Ed 2d 81, 85 S Ct 23; *People v Thomas* (4th Dept) 151 App Div 2d 996, 542 NYS2d 434; *Story v State* (Wyo) 721 P2d 1020, 65 ALR4th 1011, cert den 479 US 962, 93 L Ed 2d 405, 107 S Ct 459, later proceeding (Wyo) 755 P2d 228, later app (Wyo) 788 P2d 617, cert den (US) 112 L Ed 2d 76, 111 S Ct 106.

25. *Scalere v Stenson* (2nd Dist) 211 Cal App 3d 1446, 260 Cal Rptr 152; *Bullock v Mt. Sinai Hospital, Inc.* (Fla App D3) 501 So 2d 738, 12 FLW 437 (cross-examination properly limited); *Yassin v Certified Grocers of Illinois, Inc.* (1st Dist) 150 Ill App 3d 1052, 104 Ill Dec 52, 502 NE2d 315, app den 114 Ill 2d 559, 108 Ill Dec 427, 508 NE2d 738; *People v Van Zile* (4th Dist) 48 Ill App 3d 972, 6 Ill Dec 747, 363 NE2d 429 (7 witnesses allowed); *Re Winslow's Will*, 146 Iowa 67, 124 NW 895; *State v Franks*, 300 NC 1, 265 SE2d 177; *State v Washington*, 54 NC App 683, 284 SE2d 330 (5 witnesses sufficient to testify to mental capacity); *Leaphart v Whiting Corp.*, 387 Pa Super 253, 564 A2d 165, app den (Pa) 577 A2d 890 and app den (Pa) 577 A2d 891 (cross-examination properly limited); *Kobos v Everts* (Wyo) 768 P2d 534, reh den (Wyo) 1989 Wyo LEXIS 64; *Story v State* (Wyo) 721 P2d 1020, 65 ALR4th 1011, cert den 479 US 962, 93 L Ed 2d 405, 107 S Ct 459, later proceeding (Wyo) 755 P2d 228, later app (Wyo) 788 P2d 617, cert den (US) 112 L Ed 2d 76, 111 S Ct 106 (3 witnesses allowed).

As to the discretion of the trial court to disallow rebuttal testimony which is cumulative of the proponent's case in chief, see § 367.

Annotations: Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 § 3.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 § 3[a].

26. *State v Mucci*, 25 NJ 423, 136 A2d 761 (the right to limit the number of witnesses as to any one point or fact may be applicable to any kind of fact or witness whatsoever).

relevant,²⁷ which are cumulative of testimony adduced at trial on the issue of legal cause and which would not assist the jury in its determination.²⁸

§ 339. —Effect of inadmissible cumulative evidence

If evidence is merely cumulative, it may be regarded as of less probative force than if it were the only evidence available to its proponent.²⁹ Thus, the introduction of inadmissible hearsay, which is cumulative of other admissible evidence, results in no prejudice.³⁰

The refusal to exclude the testimony of a corroboration witness, who was not sequestered as required, is harmless error where the witness's statements were for the most part cumulative.³¹

§ 340. —Limits of discretion to exclude evidence as cumulative

Generally, a judgment will not be reversed because of the exclusion of evidence which is cumulative or tends to establish a fact which is conceded.³² But, the discretion of the trial judge to exclude cumulative evidence must be exercised in a discriminating fashion, and with wisdom, particularly where the evidence in question goes to issues of central importance in the case.³³ Evidence should not be rejected as cumulative when it goes to the very root of

27. *First Nat. Bank v Kurtz*, 232 Neb 254, 440 NW2d 432 (proposed settlement agreement).

28. *Davis v International Harvester Co.* (2d Dist) 167 Ill App 3d 814, 118 Ill Dec 589, 521 NE2d 1282, CCH Prod Liab Rep ¶ 11790, app den 122 Ill 2d 572, 125 Ill Dec 214, 530 NE2d 242 and app den (Ill) 136 Ill Dec 583, 545 NE2d 107 (photographs); *Curl v McDonough Dist. Hospital* (3d Dist) 145 Ill App 3d 796, 99 Ill Dec 639, 495 NE2d 1374; *Hill v Meister* (1st Dist) 133 Ill App 2d 678, 273 NE2d 643 (additional survey); *Jackson v Tyson* (La App 4th Cir) 526 So 2d 398; *Gurnsey v Conklin Co.*, 230 Mont 42, 751 P2d 151 (videotape); *First Nat. Bank v Kurtz*, 232 Neb 254, 440 NW2d 432; *Cumming v Nielson's, Inc.* (App) 108 NM 198, 769 P2d 732 (photographs); *Holley v Shepard* (Okla) 744 P2d 945 (videotaped deposition).

The use of a model, in a medical malpractice action based upon the misdiagnosis of an aneurysm, to graphically demonstrate changes in the plaintiff's spine which could have accounted for her headaches, with the testimony of a radiologist was not cumulative, but was relevant and helpful to the jury in understanding the theory of the defense, where the expert was the only radiologist called by the defense. *Webb v Angell* (2d Dist) 155 Ill App 3d 848, 108 Ill Dec 347, 508 NE2d 508.

Videotape evidence offered to show the normal and proper operation of a tractor in action claiming that injury was the proximate result of negligence or breach of a warranty or an unreasonably dangerous defect in the wheel of a tractor, was properly excluded where there was

other evidence in the record which explained the normal operation of the tractor. *Swiontek v Ryder Truck Rental, Inc.* (ND) 432 NW2d 893.

Practice References: For discussion of computer simulations for use in conjunction with expert testimony, see Kathleen K. Wiegner, "A Computer for the Defense," *Forbes* (February 19, 1990 p 158).

29. *Aguayo v Crompton & Knowles Corp.* (2nd Dist) 183 Cal App 3d 1032, 228 Cal Rptr 768, CCH Prod Liab Rep ¶ 11111.

30. *Jackson v Tyson* (La App 4th Cir) 526 So 2d 398.

31. *Bagnowski v Preway, Inc.* (App) 138 Wis 2d 241, 405 NW2d 746 (disagreed with on other grounds by Re Condition of S.Y. (App) 156 Wis 2d 317, 457 NW2d 326) as stated in *Re V.J.R.* (Wis App) 1990 Wisc App LEXIS 1170.

32. *Molkenbur v Hart* (Minn App) 411 NW2d 249; *Bergren v Bergren*, 77 Wyo 438, 317 P2d 1101.

Where the proffered testimony is cumulative, its exclusion is harmless. *Laurent v Uniroyal, Inc.* (Fla App D3) 515 So 2d 1050, 12 FLW 2679, review den (Fla) 525 So 2d 879, later proceeding (Fla App D3) 549 So 2d 1154, 14 FLW 2370.

33. *Kobos v Everts* (Wyo) 768 P2d 534, reh den (Wyo) 1989 Wyo LEXIS 64 and reh den (Wyo) 1989 Wyo LEXIS 67 and reh den (Wyo) 1989 Wyo LEXIS 68 and reh den (Wyo) 1989 Wyo LEXIS 70, later proceeding (Wyo) 1989 Wyo LEXIS 56, withdrawn.

the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence introduced by the respective parties.³⁴

The fact that evidence is cumulative does not make it inadmissible.³⁵ And, not all evidence which is entirely duplicative is therefore cumulative and excludible.³⁶ Evidence may vary in degree of persuasiveness, and when an item of proof which is offered on a point is very different in character or persuasive impact from an item of proof previously received, the former cannot be considered merely cumulative of the latter.³⁷

So long as facts testified to by a party are not conclusively established or admitted, they are open to further proof, and it is error to exclude evidence on the ground that it is cumulative.³⁸

||| Caution: On disputed points in criminal cases, the power to limit or exclude cumulative evidence should perhaps be more cautiously exercised.³⁹

In the absence of direct testimony, evidence of different facts from which the main fact in issue must be inferred cannot be excluded as cumulative.⁴⁰

§ 341. Expert evidence

The propriety of receiving expert testimony rests in the sound discretion of the trial court,⁴¹ and such discretion is frequently exercised to limit the number of expert witnesses.⁴²

34. *Kummer v Cruz* (Mo App) 752 SW2d 801.

35. *Brazel v State*, 296 Ark 563, 759 SW2d 28; *Neble v State*, 26 Ark App 163, 762 SW2d 393.

36. *Kobos v Everts* (Wyo) 768 P2d 534, reh den (Wyo) 1989 Wyo LEXIS 64 and reh den (Wyo) 1989 Wyo LEXIS 67 and reh den (Wyo) 1989 Wyo LEXIS 68 and reh den (Wyo) 1989 Wyo LEXIS 70, later proceeding (Wyo) 1989 Wyo LEXIS 56, withdrawn.

37. *Kobos v Everts* (Wyo) 768 P2d 534, reh den (Wyo) 1989 Wyo LEXIS 64 and reh den (Wyo) 1989 Wyo LEXIS 67 and reh den (Wyo) 1989 Wyo LEXIS 68 and reh den (Wyo) 1989 Wyo LEXIS 70, later proceeding (Wyo) 1989 Wyo LEXIS 56, withdrawn.

38. *Evans v Industrial Acci. Com.*, 71 Cal App 2d 244, 162 P2d 488; *Williams v Colonial Pipeline Co.*, 220 Ga 381, 139 SE2d 308, on remand 110 Ga App 824, 140 SE2d 150; *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940; *Traders & General Ins. Co. v Russell* (Tex Civ App) 99 SW2d 1079, writ dismissed.

As to the effect of surplusage or cumulative evidence, generally, see 29 Am Jur 2d, Evidence § 256.

Practice References: Cumulative Evidence. Danner & Toothman, Trial Practice Checklists (1989) § 8:160.

39. *State v Calico*, 55 Idaho 96, 38 P2d 1002; *State v Thompson*, 65 NJ Super 189, 167 A2d 410, 5 ALR3d 232 (enjoined limited to two of

eight witnesses); *State v Jackson*, 30 NC App 187, 226 SE2d 543 (5 alibi witnesses); *State v Lee*, 203 SC 536, 28 SE2d 402, 149 ALR 1300.

The trial court properly limited the number of witnesses a defendant called, notwithstanding his contention that the witnesses he wished to call were more credible than the ones he was actually permitted to call, where the record disclosed that the credibility of the defendants' witnesses was not attacked by the state and where there was no proof that the testimony of the additional witnesses would be other than cumulative. *State v Jackson*, 30 NC App 187, 226 SE2d 543.

Annotations: Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 §§ 3, 9-14.

40. *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164; *Potts v People*, 114 Colo 253, 158 P2d 739, 159 ALR 1410; *State v Wells* (Fla App D2) 538 So 2d 1292, 14 FLW 427.

41. *United States v Foshier* (CA1 Mass) 590 F2d 381, 3 Fed Rules Evid Serv 552.

As to the discretion of the court, and the rule of exclusion, respecting expert and opinion evidence, generally, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 5 et seq.

42. *Liddell v Missouri* (CA8 Mo) 731 F2d 1294, 76 ALR Fed 435, cert den 469 US 816, 83 L Ed 2d 30, 105 S Ct 82 and clarified (CA8 Mo) 758 F2d 290; *Ruud v United States* (CA9

§ 342. —Grounds for limiting expert opinion

The trial court may limit the number expert witnesses where other evidence, such as a report⁴³ or survey,⁴⁴ or the testimony of other experts otherwise informs the jury of the same fact.⁴⁵

A court may limit the number of expert witnesses to one expert per discipline or field of board certified expertise.⁴⁶ However, because a medical malpractice case is always necessarily a battle of expert witnesses, within only very broad limits, all qualified opinion testimony should be allowed in such an action, notwithstanding it is cumulative to other evidence.⁴⁷

A trial court may properly limit the area about which an expert witness may be questioned following an offer of proof and a finding that the prospective testimony would be largely repetitive.⁴⁸ Thus, the court properly may refuse to allow an expert to restate on redirect examination his opinion, where the defendant was not seeking by such testimony to clarify testimony which had been cast into doubt upon cross-examination, or to clarify new matter brought out on cross-examination, or to refute testimony elicited on cross-examination.⁴⁹

For the purpose of keeping the examination of witnesses on collateral issues within the bounds of reason and convenience, a court may exclude questions

Idaho) 256 F2d 460, cert den 358 US 817, 3 L Ed 2d 59, 79 S Ct 28; *McMillan v State*, 229 Ark 249, 314 SW2d 483; *Scalere v Stenson* (2nd Dist) 211 Cal App 3d 1446, 260 Cal Rptr 152; *Maler v Gheraldi* (Fla App D3) 502 So 2d 973, 12 FLW 478, review den (Fla) 513 So 2d 1062, companion case (Fla App D3) 532 So 2d 79, 13 FLW 2344 and later proceeding (Fla App D3) 541 So 2d 684, 14 FLW 737; *Webb v Priest* (Fla App D3) 413 So 2d 43; *Yorita v Okumoto*, 3 Hawaii App 148, 643 P2d 820; *Hill v Meister* (1st Dist) 133 Ill App 2d 678, 273 NE2d 643; *Walters v Hitchcock*, 237 Kan 31, 697 P2d 847; *Powers v Kansas Power & Light Co.*, 234 Kan 89, 671 P2d 491, CCH Prod Liab Rep ¶9973; *Molkenbur v Hart* (Minn App) 411 NW2d 249; *Irrizary v New York* (1st Dept) 95 App Div 2d 713, 464 NYS2d 5; *Board of Transp. v Eastern Developers & Rentals, Inc.*, 28 NC App 114, 220 SE2d 198; *Jewelcor Jewelers & Distributors, Inc. v Corr*, 373 Pa Super 536, 542 A2d 72, app den 524 Pa 608, 569 A2d 1367; *Commonwealth ex rel. Amoroso v Amoroso*, 212 Pa Super 94, 239 A2d 878; *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940.

Annotations: Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 § 12.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169 §§ 3[b], 17-20.

Practice References: How to Select and Work with Experts. Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases* (1985) §§ 9:1-10:24.

Basis of Expert Opinion. Carlson, *Successful Techniques for Civil Trials* (1983) § 4:20.

Trial Expert Preparation. Danner & Toothman, *Trial Practice Checklists* (1989) § 7:50.

43. *Whitmore v Fischer* (Minn App) 397 NW2d 371.

44. *Hill v Meister* (1st Dist) 133 Ill App 2d 678, 273 NE2d 643.

45. *Reed v Spencer* (Mo App) 758 SW2d 736.

Practice References: For discussion of trial strategies in presenting, simplifying, and clarifying for the jury expert evidence of a voluminous and technical nature, see Sekuler, "Helping Jurors Understand Complex Cases," *Lawyers Alert* (July 9, 1990 p 9).

46. *Maler v Gheraldi* (Fla App D3) 502 So 2d 973, 12 FLW 478, review den (Fla) 513 So 2d 1062, companion case (Fla App D3) 532 So 2d 79, 13 FLW 2344 and later proceeding (Fla App D3) 541 So 2d 684, 14 FLW 737.

47. *Lake v Clark* (Fla App D5) 533 So 2d 797, 13 FLW 2238, review den (Fla) 542 So 2d 1332 and review den (Fla) 542 So 2d 1332 and review den (Fla) 542 So 2d 1334.

48. *Da Foe v Michigan Brass & Electric Co.*, 175 Mich App 565, 438 NW2d 270; *Reome v Cortland Memorial Hospital* (3d Dept) 152 App Div 2d 773, 543 NYS2d 552; *Abbott v New Rochelle Hospital Medical Center* (2d Dept) 141 App Div 2d 589, 529 NYS2d 352, app den 72 NY2d 808, 534 NYS2d 666, 531 NE2d 298.

As to offers of proof, generally, see §§ 436 et seq.

49. *State v Franks*, 300 NC 1, 265 SE2d 177.

asked expert witnesses based on a state of facts finding no support in the evidence, although such questions are asked on cross-examination.⁵⁰

The trial court does not err in refusing to permit an expert to testify, where the court is simply invoking its discretion to coordinate the order of evidence by requiring another expert of the party, whose qualifications the court deemed to be more relevant to the issue, to testify first, since the party may reoffer the other expert's testimony.⁵¹

§ 343. Impeaching evidence

The court frequently exercises its discretion to limit impeaching evidence,⁵² although the court's discretion to limit impeaching evidence is more circumscribed in the case of a criminal prosecution.⁵³ The discretion of the court to limit cross-examination for the purpose of impeachment when it becomes repetitious or argumentative does not violate any provision of the United States Constitution.⁵⁴

An arbitrary numerical limitation, or permitting only a few witnesses to impeach the credibility of an important adverse witness, is an abuse of discretion.⁵⁵

§ 344. Rebuttal evidence; surrebuttal

Although a trial court ordinarily has broad discretion in limiting the number of witnesses,⁵⁶ it is an abuse of discretion to limit the number of rebuttal

50. *Barfield v South Highland Infirmary*, 191 Ala 553, 68 So 30.

As to the court's discretion to limit testimony on collateral matters, generally, see § 334.

51. *Williams v Madison County Wood Products, Inc.* (Mo App) 720 SW2d 447.

As to the discretion of the parties, generally, in the order in which they present their proof, see § 359.

52. *United States v Fernandez* (CA9 Cal) 497 F2d 730, cert den 420 US 990, 43 L Ed 2d 670, 95 S Ct 1423, reh den 421 US 1017, 44 L Ed 2d 686, 95 S Ct 2425; *United States v Somers* (CA3 NJ) 496 F2d 723, cert den 419 US 832, 42 L Ed 2d 58, 95 S Ct 56 and cert den 419 US 832, 42 L Ed 2d 58, 95 S Ct 56 and cert den 419 US 832, 42 L Ed 2d 58, 95 S Ct 57; *Ivery v State* (Fla App D2) 548 So 2d 887, 14 FLW 2182; *People v Van Zile* (4th Dist) 48 Ill App 3d 972, 6 Ill Dec 747, 363 NE2d 429; *State v Boykin*, 298 NC 687, 259 SE2d 883, cert den 446 US 911, 64 L Ed 2d 264, 100 S Ct 1841; *State v West* (Tenn) 767 SW2d 387, cert den (US) 111 L Ed 2d 764, 110 S Ct 3254; *Conlee v Taylor*, 153 Tenn 507, 285 SW 35, 48 ALR 940; *Nelson v State* (Tex Crim) 765 SW2d 401; *Traders & General Ins. Co. v Russell* (Tex Civ App) 99 SW2d 1079, writ dism w o j.

A limitation upon the number of witnesses as to a party's statements against interest has been held unauthorized where the testimony of

the various witnesses related to similar utterances which were made at different times or places. *Stokes v Bryan*, 42 Ala App 120, 154 So 2d 754, 5 ALR3d 164.

As to impeachment of the credibility of witnesses, generally, including the use of character and reputation evidence, see 81 Am Jur 2d, Witnesses §§ 518 et seq.

Annotations: Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238 § 13.

Practice References: Impeaching the witness. *Danner & Toothman*, *Trial Practice Checklists* (1989) § 8:180.

53. *State v Calico*, 55 Idaho 96, 38 P2d 1002; *People v Van Zile* (4th Dist) 48 Ill App 3d 972, 6 Ill Dec 747, 363 NE2d 429 (in prosecution for aggravated kidnapping, armed robbery, and burglary, trial court did not abuse its discretion in excluding testimony of eighth impeaching defense witness).

54. *State v Boykin*, 298 NC 687, 259 SE2d 883, cert den 446 US 911, 64 L Ed 2d 264, 100 S Ct 1841.

55. *Cope v State*, 23 Okla Crim 161, 213 P 753.

Annotations: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327 §§ 3, 4[a, b].

56. § 328.

witnesses as where, after hearsay evidence was received upon supposition that it could be rebutted by calling witnesses, each party is limited to only two rebuttal witnesses.⁵⁷

The trial court may properly disallow the the testimony of a rebuttal witness which is cumulative of the proponent's evidence presented in the case in chief as improper rebuttal.⁵⁸

|||| Observation: If the plaintiff presents a rebuttal case, defendant has the option, in most courts, of presenting a surrebuttal case, and some judges may allow additional iterations, if necessary.⁵⁹

While it has been held that surrebuttal is a matter of right to deny, explain, or avoid new matters, it has also been stated that surrebuttal by the defendant is not a matter of right, but may be allowed at the court's discretion.⁶⁰ The trial court does not abuse its discretion to limit the number of witnesses a party may call by refusing to permit a defendant to call three surrebuttal witnesses, where the testimony of two expert witnesses has already been received to prove the validity of the defense.⁶¹

3. INTRODUCTION OF DOCUMENTARY EVIDENCE [§§ 345-353]

a. IN GENERAL [§ 345]

§ 345. Definition of documentary evidence

The concept of "documentary evidence" is much broader than the commonly understood meaning of a writing,⁶² and includes handwriting, typewriting, printing, photography, videotapes, motion pictures, tape recordings, and telegrams.⁶³

|||| Caution: The use of videotape depositions and other forms of recorded testimony may raise questions on appeal respecting impermissible and unnecessary infringement of an accused's constitutional right of confrontation;⁶⁴ counsel is advised to check the rules of court and evi-

57. *Fuhrman v Fuhrman* (ND) 254 NW2d 97.

As to rebuttal evidence with respect to the order of proof, see §§ 365 et seq.

58. § 367.

59. **Practice References:** *Danner & Toothman, Trial Practice Checklists* (1989) § 8:200.

60. § 378.

61. *Yorita v Okumoto*, 3 Hawaii App 148, 643 P2d 820.

For discussion of surrebuttal with respect to the order of proof, and the party's right to surrebuttal, see § 377.

62. **Practice References:** *Danner & Toothman, Trial Practice Checklists* (1989) § 5:70.

For a detailed discussion of particular types of documentary evidence, see 29 Am Jur 2d, Evidence §§ 859 et seq.

63. **Practice References:** *Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 15:6.

8 Am Jur Proof of Facts 153, Motion Pictures as Evidence; 9 Am Jur Proof of Facts 147, Photographs as Evidence.

Annotations: Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 812.

64. *Lee v McCaughtry* (CA7 Wis) 892 F2d 1318, 29 Fed Rules Evid Serv 733, on remand (ED Wis) 738 F Supp 1244 and cert den (US) 111 L Ed 2d 754, 110 S Ct 3244; *United States v Kelly* (CA3 Pa) 892 F2d 255, 29 Fed Rules Evid Serv 856, cert den (US) 1990 US LEXIS 3330, withdrawn, reported at (US) 111 L Ed 2d 754, 110 S Ct 3243; *United States v Davis* (CA7 Ill) 890 F2d 1373, 29 Fed Rules Evid Serv 175, cert den (US) 107 L Ed 2d 1068, 110 S Ct 1165; *State v Lewis*, 211 Conn 185, 558 A2d 237; *Rhodes v State* (Fla) 547 So 2d 1201, 14 FLW 343; *People v Bastien*, 129 Ill 2d 64, 133 Ill Dec 459, 541 NE2d 670; *State v Albert*, 13 Kan App 2d 671, 778 P2d 386; *People v Poywing* (2d Dept) 150 App Div 2d 810, 542

dence in the relevant jurisdiction with respect to procedure and the use of videotape evidence and prerecorded testimony.

b. ADMISSION INTO EVIDENCE [§§ 346-353]

§ 346. Generally; admissibility

It is fundamental and essential that, at trial, a document must be offered to and admitted by the court before it may be considered evidence.⁶⁵

Documentary evidence, when it is offered, is subject to the same rules of admissibility of evidence and the court's discretion respecting relevancy, competency, and materiality as is oral testimony.⁶⁶

Where a written document is admitted into evidence, the entire contents of the document are admitted.⁶⁷ Otherwise, when a document is offered only in its entirety, rather than in separate sections, and some parts require exclusion, the whole document must be excluded upon a proper objection.⁶⁸ But, the exclusion of impertinent and irrelevant evidence is not error, even where it has been marked by the state as an exhibit in the case.⁶⁹

While it may be unusual for counsel to read a document admitted into evidence to the jury during its case in chief, it is not reversible error where the jury has access to the documents.⁷⁰ However, it is error to permit the trier of fact to consider documents which have not been tendered or admitted into evidence.⁷¹

Caution: Counsel should be prepared to respond to objections to admissibility; if counsel neglects to lay a proper foundation for admissibility of documentary evidence, the evidence may be excluded regardless of its importance or probative value.⁷²

NYS2d 232; *State v Pilkey* (Tenn) 776 SW2d 943, reh den (Tenn) 1989 Tenn LEXIS 426 and cert den (US) 108 L Ed 2d 619, 110 S Ct 1483 and cert den (US) 108 L Ed 2d 646, 110 S Ct 1510; *Tucker v State* (Tex Crim) 771 SW2d 523, reh den and stay den, cert den 492 US 912, 106 L Ed 2d 578, 109 S Ct 3230.

As to right of confrontation, generally, see 16A Am Jur 2d, Constitutional Law § 849.

For discussion of videotape depositions, generally, see 21A Am Jur 2d, Criminal Law § 960; 23 Am Jur 2d, Depositions and Discovery §§ 155-157.

For a discussion of defense strategies to limit the use by plaintiffs of day-in-the-life videos to arouse the sympathies of the jury, see Green, "Attorneys Try to Defuse Sympathy in Injury Cases," Wall Street Journal.

Practice References: As to introduction of documentary evidence in federal courts, see 12 Federal Procedure, L Ed, Evidence §§ 33:481 et seq.

65. *Commonwealth, Dept. of Transp., Bureau of Driver Licensing v McCrea* (Pa Cmwlt) 526 A2d 474, later app 110 Pa Cmwlt 261, 532 A2d 72.

Documents upon which a party rests his case must be offered into evidence. *Spicewood, Inc. v Dykes Paving & Constr. Co.*, 185 Ga App 397, 364 SE2d 298.

66. 29 Am Jur 2d, Evidence § 834.

67. *Wiley v State*, 192 Ga App 808, 386 SE2d 523 (tape recorded statement); *Rob-Lee Corp. v Cushman* (Mo App) 727 SW2d 455; *People v Economy* (2d Dept) 156 App Div 2d 459, 548 NYS2d 750, app den 75 NY2d 966, 556 NYS2d 250, 555 NE2d 622 (videotaped statement).

As to objection to evidence admissible in part, see § 430.

68. *Bratton v Bond* (Iowa) 408 NW2d 39.

69. § 351.

70. *Kneip v Unitedbank-Victoria* (Tex App Corpus Christi) 734 SW2d 130, later app (Tex App Corpus Christi) 774 SW2d 757.

71. *Spicewood, Inc. v Dykes Paving & Constr. Co.*, 185 Ga App 397, 364 SE2d 298.

72. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 15:8.

■■■■ *Practice guide:* If counsel does not have the original of a document, provision should be made to overcome a best evidence objection, in addition to the usual hearsay objection.⁷³

§ 347. —Foundational requirements

Although, generally, counsel must show the authenticity of the proffered writing,⁷⁴ the extent of the foundation for documentary proof rests in the discretion of the trial judge.⁷⁵

■■■■ *Practice guide:* A document may be admitted on condition that the foundation subsequently will be laid or when the court is satisfied as to its authenticity without proof and takes judicial notice of its admissibility.⁷⁶

Because visual evidence is frequently critical in nature, the competent trial lawyer must master the foundation patterns involved in introducing an exhibit.⁷⁷

§ 348. Use of exhibits, generally

Visual proof speaks volumes to a judge or jury long after the final summations are heard. As deliberations and arguments rage in the jury room, jury members regularly handle, review, and re-examine documents or objects sent in with them. An exhibit may be the one piece of evidence which stands uncontradicted, in contrast to the oral testimony of the parties which is so often challenged, and thus the tangible item proves decisive.⁷⁸

■■■■ *Observation:* Computer-animated graphics, videotaped mini-documentaries, three dimensional scale models, and strategically designed charts and illustrations are playing an increasingly significant role in influencing verdicts. Studies done indicate that most people remember up to 87% of information that they hear and see at the same time. Only 10% of the same information is retained if it is presented orally, without visual illustrations.⁷⁹

■■■■ *Recommendation:* It was once deemed prudent not to use exhibits,

73. Practice References: Danner & Toothman, Trial Practice Checklists (1989) §§ 7:60 and 8:140, respectively.

Annotations: Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 ALR3d 598.

74. 29 Am Jur 2d, Evidence § 849.

75. *Topinka v Minnesota Mut. Life Ins. Co.*, 189 Minn 75, 248 NW 660, 95 ALR 739; *State v Ramos*, 131 NH 276, 553 A2d 275 (defense testimony to substance of prior conviction sufficient foundation for copy of actual conviction proffered by prosecution).

The trial court properly refused to let the plaintiffs, in a wrongful death action, read into evidence certain portions of defendant hospital's records without first offering them into evidence since the trial court may properly require the records be authenticated and in evidence before anything be read to the jury. *Collins v West Plains Memorial Hospital* (Mo App) 735 SW2d 404.

Practice References: Documents and Depositions as Trial Exhibits. Danner & Toothman, Trial Practice Checklists (1989) § 7:60.

76. Practice References: Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 15:7.

77. § 350.

78. Practice References: Carlson, *Successful Techniques for Civil Trials* (1983) § 3:1.

79. Practice References: Sekuler, "New Demonstrative Evidence to Help Your Clients," *Lawyers Alert* (August 6, 1990) p 31.

As to the proper use of demonstrative evidence at a trial, generally, including the use of charts, maps, diagrams, videotapes, motion pictures, and the like, see §§ 505 et seq.

For discussion of the impact of videotape evidence in litigation, see Geyelin, "Candid Camera Wins Some Court Fights for Insurers but Stirs Fairness Debate." *The Wall Street Journal* (August 23, 1990) B1.

which were to be introduced at trial, during the opening statement. Because exhibits can be useful in informing the jury what counsel intends to prove, counsel should seek a stipulation from opposing counsel allowing such exhibits as will make the opening interesting and informative; if counsel refuses, ask the court's permission during the pretrial conference.⁸⁰

■■■■ *Caution:* When marshaling exhibits for the trial of a complex case, less may be more. One study⁸¹ indicated that jurors are confused, and possibly alienated, by having to sort out numerous exhibits in the jury room. More than half the jurors polled stated that too many exhibits confused the deliberations. Thus, while the other side may appear to be gaining the edge by piling up a mass of favorable evidence, the reality may be that the jury is being confused and turned off by the sheer volume of information.⁸²

■■■■ *Recommendation:* Counsel who are trying a complex case should resist the temptation to include every possible exhibit, even where the exhibits appear helpful to the cause. Amplify the main points and key testimony. Focus on simplifying and clarifying for the jurors information as it comes in.⁸³

§ 349. Types of exhibits

Real evidence, visual aids, and demonstrative charts, models and replicas typically break down into two major categories:

- (1) Tangible items which performed a function in the incident which gave rise to the litigated case, such as a ladder which collapsed, in a products liability action, or a knife used by a defendant in an attack which later results in a civil action for money damages.⁸⁴ These exhibits are typically marked for identification, offered, and if received in evidence will generally be delivered to the jury room for consideration during deliberations.⁸⁵
- (2) Demonstrative aids, such as a plastic model of a skull in a head injury case, or a diagram on poster board of the intersection where an accident occurred; items in the latter category are often used by witnesses to illustrate their testimony (a neurosurgeon, for example, may show the effect of trauma on plaintiff's head by manipulating the plastic skull during his testimony), but typically they are not formally received as exhibits.⁸⁶

80. Practice References: James S. Rogers, "Revising Outdated Trial Tactics," *Trial* (July 1989) p 73.

As to the court's consideration of exhibits presented during the opening statement, in determining a motion thereon for nonsuit, see § 891.

81. Practice References: "Jury Comprehension in Complex Cases," Report of the Special Committee of the ABA Section of Litigation, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611.

82. Practice References: Sekuler, "Helping Jurors Understand Complex Cases," *Lawyers Alert*, Vol. 9. No. 19 (July 9, 1990).

83. Practice References: Sekuler, "Helping Jurors Understand Complex Cases," *Lawyers Alert*, Vol. 9. No. 19 (July 9, 1990).

84. Practice References: Carlson, *Successful Techniques for Civil Trials* (1983) § 3:1.

85. § 351.

86. Practice References: Carlson, *Successful Techniques for Civil Trials* (1983) § 3:1.

Photographs fall into the first category, formal exhibits, and are sometimes termed "accessorial" real evidence.⁸⁷ With photographic evidence, upon challenge to the accuracy of the photo, testimony must be introduced showing that the conditions under which the photograph was taken did not distort the picture and that the object photographed was in the same condition at the time when the photograph was made as it was at the time when it became the subject of legal inquiry. Finally, there will be proof that the photograph is a fair and reasonable representation of actual condition portrayed. This may involve extensive inquiry, and much has been written upon the preparation and presentation of photographic evidence.⁸⁸

Observation: Photographs may never be used for the purpose of inflaming the passions of the jury.⁸⁹

§ 350. —Offering exhibits

Ordinarily the marking⁹⁰ or filing of an exhibit does not put such exhibit before the court as evidence.⁹¹

The trial procedure for offering a document into evidence requires that the document be marked as an exhibit, then shown or tendered to opposing counsel and the court, and then given to the witness to review, read, and identify, if opposing counsel has no objection to its admission or has previously stipulated to its admission.⁹²

Caution: To preserve a record, stipulations to the admissibility of exhibits should be read into the record. Each counsel should inform the court of the stipulation, and read it into the record, within the hearing of the jury, in an orderly and sequential manner. The exhibits then will be received by the court without further foundation proof, and witnesses may make use of the exhibits as adjuncts to testimony.⁹³

When a videotape is played in the trial court, the court reporter should not cease reporting but continue so that a stenographic record is made of the

87. Practice References: Ladd & Carlson, *Cases and Material on Evidence* 649 (1972).

On the evidentiary classification of photographs, see *Bergner v State* (Ind App) 397 NE2d 1012.

88. Practice References: Carlson, *Successful Techniques for Civil Trials* (1983) § 3:1.

89. § 507.

90. *Commonwealth, Dept. of Transp., Bureau of Driver Licensing v McCrea* (Pa Cmwlth) 526 A2d 474, later app 110 Pa Cmwlth 261, 532 A2d 72.

91. *Ker v Ker* (Mo App) 776 SW2d 873.

Items of evidence which are physically placed in the record of a cause, but which are not properly introduced and admitted into evidence by the trial court, may not be considered by any tribunal in deciding the merits of the case. *Bowman v Weill Constr. Co.* (La App 3d Cir) 502 So 2d 133, writ den, review den (La) 503 So 2d 495.

A police report which was not marked as an

exhibit and was not offered to or received by the court was not in technical terms evidence, and the trial court properly refused to permit the plaintiff's counsel to read to the jury from such report. *Cannon v Venture Stores, Inc.* (Mo App) 743 SW2d 473.

Practice References: 4 POF2d 707, *Foundation for Admission of Map, Diagram, or Chart.*

2 Am Jur Trials 669, *Preparing and Using Maps*; 3 Am Jur Trials 377, *Preparing and Using Models*; 3 Am Jur Trials 507, *Preparing and Using Diagrams.*

92. Practice References: *Danner & Toothman, Trial Practice Checklists* (1989) § 8:140.

As to inspection of documents, see § 352.

Forms: Motion—For order requiring opposing party to furnish English translations of exhibits in foreign language. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 75.

93. Practice References: Carlson, *Successful Techniques for Civil Trial* (1983) § 2:33.

evidence being presented to the court, and when such videotape has ended, counsel should submit it to the court as an exhibit.⁹⁴

It is the duty of the party seeking to exclude an exhibit, when the exhibit is admitted to the trial conditionally, to renew its objection by moving to strike, if its relevancy is not thereafter established.⁹⁵

■■■ Recommendation: A rejected exhibit should be given to the court reporter for inclusion in the trial record; the exhibit will not be circulated among the jurors or taken into the jury room, but will be retained for the record on appeal.⁹⁶

§ 351. —Marking documents as exhibits

■■■ Observation: Items of documentary evidence may be marked as exhibits by the court clerk before being used at trial. Practice and custom vary concerning the marking of trial exhibits, so counsel should check local rules and pretrial procedure.⁹⁷

In order to preserve the claim that an exhibit should have been admitted as a full exhibit, a party is required to have the exhibit marked for identification regardless of whether the offering party has it in his possession as long as it is reasonably apparent that the other party or a witness has it in his possession.⁹⁸

Where local procedure requires that parties submit a list of exhibits to the court prior to trial, the trial court may properly, on objection, exclude documentary evidence not appearing on the list submitted.⁹⁹

It is proper to mark as an exhibit a writing which is competent evidence when it can only be used for its legitimate purpose.¹ But, even where evidence has been marked by the state as an exhibit in the case, limiting the use of photographs by the jury to the time of deliberation² or excluding impertinent and irrelevant parts of the evidence is not error.³

■■■ Recommendation: Counsel should insure that documents used by opposing counsel are marked, because exhibits then come under the custody and control of the court, and may not be removed without the court's permission.⁴

A document which is offered to be marked and authenticated for evidence, during the opposing counsel's presentation of his case in chief, should not be allowed into evidence until the proponent's presentation of evidence.⁵

94. *Matson v Wilco Office Supply & Equipment Co.* (Fla App D1) 541 So 2d 767, 14 FLW 945.

95. § 475.

96. **Practice References:** Carlson, *Successful Techniques for Civil Trial* (1983) § 3:34.

97. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 15:3.

Danner & Toothman, *Trial Practice Checklists* (1989) § 8:140.

98. *Kraus v Newton*, 14 Conn App 561, 542 A2d 1163, app gr 208 Conn 815, 546 A2d 282 and affd 211 Conn 191, 558 A2d 240.

99. *Crawford v Shivashankar* (Fla App D1) 474 So 2d 873, 10 FLW 2019, 56 ALR4th 1097 (thermogram photographs offered to show permanent injury to plaintiff).

1. *Curtis v Bradley*, 65 Conn 99, 31 A 591.

2. *People v Flayhart*, 72 NY2d 737, 536 NYS2d 727, 533 NE2d 657.

3. *State v Mockus*, 120 Me 84, 113 A 39, 14 ALR 871.

4. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 15:3.

5. § 362.

§ 352. Inspection of documents; in camera

Usually where a party has a document which he desires to introduce in evidence, the opposite party has a right to inspect it,⁶ although under some statutes this right may be exercised only when the paper is offered in evidence, or when he is given the right to examine the witness identifying it, who must be recalled when the evidence is offered.⁷

When the original documents are voluminous and cannot be conveniently examined to extract the fact to be proved, any competent witness who has seen the originals may testify to the fact, provided it is capable of being ascertained by calculation.⁸

Placing at the disposal of the jury a large mass of documentary evidence generally constitutes error, especially where part of the evidence is incompetent.⁹ It is generally required that the documents that are summarized be available in court or at least made available to the opposing party.¹⁰

Prior to a criminal trial, the court may properly refuse a request by defense counsel that the prosecuting attorney submit for his inspection and examination a statement made by the defendant respecting the crime involved, reduced to a writing and in the possession of the prosecuting attorney.¹¹ However, defense counsel may inspect a statement by a coperpetrator, intended to testify with immunity as the prosecution's chief witness, where in-camera inspection reveals that the statement contains inconsistencies affecting credibility.¹²

Impromptu demands for the production of statements of witnesses or parties, at the time in the actual possession of an adversary in court, have been properly denied.¹³

6. State ex rel. Corbin v Superior Court of State, 99 Ariz 382, 409 P2d 547 (dictum); State v Barnard (La) 287 So 2d 770; Mascarenas v State, 80 NM 537, 458 P2d 789; People v Clark (4th Dept) 89 App Div 2d 820, 453 NYS2d 525, cert den 459 US 1090, 74 L Ed 2d 937, 103 S Ct 577; People v Bach (2d Dept) 33 App Div 2d 560, 305 NYS2d 677, app dismd 27 NY2d 800, 315 NYS2d 860, 264 NE2d 352, later proceeding 65 Misc 2d 994, 319 NYS2d 703; State v Lake, 305 NC 143, 286 SE2d 541; State v Abernathy, 295 NC 147, 244 SE2d 373; State v Tate, 58 NC App 494, 294 SE2d 16, app dismd, petition den 306 NC 750, 295 SE2d 763 and affd 307 NC 464, 298 SE2d 386; State v Rhoads, 81 Ohio St 397, 91 NE 186 (ovrld on other grounds by State v White, 15 Ohio St 2d 146, 44 Ohio Ops 2d 132, 239 NE2d 65); Haywood v State (Tex Crim) 507 SW2d 756.

As to disclosure and inspection, generally, see 23 Am Jur 2d, Depositions and Discovery §§ 420 et seq.

Annotations: Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 ALR3d 8 § 9[c].

7. Stockwell v Mutual Life Ins. Co., 140 Cal 198, 73 P 833.

8. Re Marriage of Kaplan (1st Dist) 149 Ill App 3d 23, 102 Ill Dec 719, 500 NE2d 612.

9. Bates v Brooks, 222 Iowa 1128, 270 NW 867, 109 ALR 1371.

10. Re Marriage of Kaplan (1st Dist) 149 Ill App 3d 23, 102 Ill Dec 719, 500 NE2d 612.

11. State v Corkran, 3 Ohio St 2d 125, 32 Ohio Ops 2d 132, 209 NE2d 437.

12. Hernandez v State (Fla App D3) 348 So 2d 1224, cert den (Fla) 355 So 2d 517.

13. Barrington v Pacific E.R. Co., 83 Cal App 100, 256 P 567; People v Thatcher (Colo) 638 P2d 760; People v Angelini (Colo App) 649 P2d 341, later app (Colo App) 706 P2d 2 (disapproved by People v Romero (Colo) 745 P2d 1003, cert den 485 US 990, 99 L Ed 2d 506, 108 S Ct 1296); State v Carrione, 188 Conn 681, 453 A2d 1137, cert den 460 US 1084, 76 L Ed 2d 347, 103 S Ct 1775; State v McClellan (Lucas Co) 6 Ohio App 2d 155, 35 Ohio Ops 2d 315, 217 NE2d 230, cert den 386 US 1022, 18 L Ed 2d 462, 87 S Ct 1380; Romero v State (Tex App Corpus Christi) 636 SW2d 782; Moody v State (Tex Crim) 413 SW2d 109; Norfolk & W.R. Co. v Wilkes' Adm'r, 137 Va 302, 119 SE 122.

Annotations: Right of accused in state courts

§ 353. Impeachment of documents

While it is the general rule that a party introducing documentary evidence cannot attack the document by impeaching evidence which discredits the document as a whole,¹⁴ a party is not precluded from impeaching a document, produced by his adversary upon notice, which he introduced in evidence contending that it was not genuine.¹⁵

B. ORDER OF PROOF [§§ 354–394]

Research References

ALR Digest to 3d, 4th, and Federal, Trial §§ 18-23

Index to Annotations, Evidence; Fair and Impartial Trial; Jury and Jury Trial; Trial; Trial by Court; Witnesses

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 314; 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 76, 77

5 Am Jur Trials 505, Mapping the Trial—Order of Proof; 5 Am Jur Trials 611, Presenting Plaintiff's Case § 28; 5 Am Jur Trials 695, Courtroom Semantics §§ 112-114

25 Federal Procedure, L Ed, New Trial §§ 58:1-58:3, 58:8-58:12, 58:19, 58:39-58:44
Bailey & Rothblatt, Investigation and Preparation of Criminal Cases (2d ed, 1985), §§ 11:1-11:19, 15:35

Carlson, Successful Techniques for Civil Trial (1983), §§ 2:15; 4:1, 4:2

Danner & Toothman, Trial Practice Checklists (1989), §§ 8:70, 8:200, 8:250

Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) §§ 14:6-14:13

1. ORDER OF PROOF AS BETWEEN PARTIES [§§ 354–357]

§ 354. Discretion of court as to order of proof

The order of proof is within the sound discretion of the trial court,¹⁶ and an

to inspection or disclosure of evidence in possession of prosecution, 7 ALR3d 8 § 9[b, c].

14. 29 Am Jur 2d, Evidence § 840.

15. Western Union Tel. Co. v Hines, 96 Ga 688, 23 SE 845.

Practice References: Forgeries and Questioned Documents. Bailey and Rothblatt, Investigation and Preparation of Criminal Cases (1985) §§ 31:1-31:14.

16. Thiede v Utah Territory, 159 US 510, 40 L Ed 237, 16 S Ct 62; Ames v Quimby, 106 US 342, 27 L Ed 100, 1 S Ct 116; United States v Shurn (CA8 Mo) 849 F2d 1090, 26 Fed Rules Evid Serv 123; United States v Zemek (CA9 Wash) 634 F2d 1159, 7 Fed Rules Evid Serv 216, cert den 450 US 916, 67 L Ed 2d 341, 101 S Ct 1359; Neely v United States (CA9 Ariz) 300 F2d 67, 9 AFTR 2d 1046, 93 ALR2d 718, cert den 369 US 864, 8 L Ed 2d 84, 82 S Ct 1030; Alford v State Farm Fire & Casualty Co. (Ala) 496 So 2d 19; Sirotiak v H.C. Price Co. (Alaska) 758 P2d 1271; People v McDermmand (1st Dist) 162 Cal App 3d 770, 211 Cal

Rptr 773; Hubbard v State (Ind) 514 NE2d 1263; Pointer v State (Ind) 499 NE2d 1087; Fireman's Fund Ins. Co. v Bragg, 76 Md App 709, 548 A2d 151; Norwest Bank Midland v Shinnick (Minn App) 402 NW2d 818; Marquardt v Kansas C.S.R. Co. (Mo) 358 SW2d 49, 2 ALR3d 1311; Iota Management Corp. v Boulevard Invest. Co. (Mo App) 731 SW2d 399; Williams v Madison County Wood Products, Inc. (Mo App) 720 SW2d 447; State v Hamel, 130 NH 615, 547 A2d 223; State v Dolbow, 117 NJL 560, 189 A 915, 109 ALR 1488, app dismd 301 US 669, 81 L Ed 1334, 57 S Ct 943; State v Cummings, 63 NM 337, 319 P2d 946; People v Becker, 215 NY 126, 109 NE 127, reh den 215 NY 721, 109 NE 1086; People v Reeves (1st Dept) 156 App Div 2d 305, 548 NYS2d 690, app den 76 NY2d 741, 558 NYS2d 1199; Kennedy v Peninsula Hospital Center (2d Dept) 135 App Div 2d 788, 522 NYS2d 671; People v Cook (3d Dept) 128 App Div 2d 948, 513 NYS2d 259; State v Boykin, 298 NC 687, 259 SE2d 883, cert den 446 US 911, 64 L Ed 2d 264, 100 S Ct 1841; State v Bickford, 28 ND 36, 147 NW 407; State v Graven, 54 Ohio

appellate court will interfere only where there is an abuse of discretion.¹⁷ Thus, the order of proof may be varied as occasion requires.¹⁸

The trial court has considerable discretion in requiring that evidence be brought to the jury's attention in a manner least likely to cause confusion¹⁹ or inconvenience to the witness.²⁰ This discretion includes the postponement of cross-examination in a criminal trial,²¹ except over an objection and where the postponement is for the sole purpose of rendering the prosecutor's cross-examination more effective.²²

§ 355. —Reception of late proof

The trial court is authorized to permit additional evidence to be offered at any time when it clearly appears necessary to the due administration of justice.²³ Where evidence is offered at a time when it is too late, the court should be liberal and receive it if a refusal to do so might work injustice.²⁴

§ 356. Effect of burden of proof

Although the court may alter the order of proof,²⁵ the plaintiff, as the party

St 2d 114, 8 Ohio Ops 3d 113, 374 NE2d 1370; State v Farr, 8 Or App 78, 492 P2d 305, cert den 406 US 973, 32 L Ed 2d 674, 92 S Ct 2423; Commonwealth v Smith, 518 Pa 15, 540 A2d 246; Commonwealth v Dunkle, 385 Pa Super 317, 561 A2d 5, app gr 524 Pa 625, 574 A2d 67 and app gr 524 Pa 625, 574 A2d 67; State v Bessette, 148 Vt 17, 530 A2d 549; Bevins v King, 147 Vt 203, 514 A2d 1044, 1 UCCRS2d 787.

Practice References: Altering order of proof. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof §§ 27 et seq.

17. Clark v Fredericks, 105 US 4, 26 L Ed 938; Ingle v Jones, 76 US 486, 19 L Ed 621; Johnston v Jones, 66 US 209, 17 L Ed 117; Philadelphia & T.R. Co. v Stimpson, 39 US 448, 10 L Ed 535; Mayer v Brensinger, 180 Ill 110, 54 NE 159; Williams v Madison County Wood Products, Inc. (Mo App) 720 SW2d 447; Exchange State Bank v Occident Elevator Co., 95 Mont 78, 24 P2d 126, 90 ALR 740; People v Reeves (1st Dept) 156 App Div 2d 305, 548 NYS2d 690, app den 76 NY2d 741, 558 NYS2d 1199; Cities Service Oil Co. v Burkett, 176 Ohio St 449, 27 Ohio Ops 2d 424, 200 NE2d 314; State v Graven, 54 Ohio St 2d 114, 8 Ohio Ops 3d 113, 374 NE2d 1370; N.W. Graham & Co. v W.H. Davis & Co., 4 Ohio St 362; State v Farr, 8 Or App 78, 492 P2d 305, cert den 406 US 973, 32 L Ed 2d 674, 92 S Ct 2423; Commonwealth v Dunkle, 385 Pa Super 317, 561 A2d 5, app gr 524 Pa 625, 574 A2d 67 and app gr 524 Pa 625, 574 A2d 67; Smith v Commonwealth, 182 Va 585, 30 SE2d 26, 153 ALR 1150; State v Bessette, 148 Vt 17, 530 A2d 549.

18. Kennedy v Peninsula Hospital Center (2d Dept) 135 App Div 2d 788, 522 NYS2d 671.

19. Kobos v Everts (Wyo) 768 P2d 534, reh den (Wyo) 1989 Wyo LEXIS 64 and reh den (Wyo) 1989 Wyo LEXIS 67 and reh den (Wyo) 1989 Wyo LEXIS 68 and reh den (Wyo) 1989 Wyo LEXIS 70, later proceeding (Wyo) 1989 Wyo LEXIS 56, withdrawn.

20. Maciukevicius v Zagorski (1st Dist) 172 Ill App 3d 303, 122 Ill Dec 310, 526 NE2d 569 (scheduling accommodation was permissible to allow plaintiff's expert to testify before plaintiff finished testifying).

21. People v McDermid (1st Dist) 162 Cal App 3d 770, 211 Cal Rptr 773.

It is in the court's discretion to order that cross-examination follow at the conclusion of direct examination as to all of the plaintiffs, rather than to interrupt the direct examination at the conclusion of each witness' testimony. Elam v Alcolac, Inc. (Mo App) 765 SW2d 42, later proceeding (Mo App) 1988 Mo App LEXIS 1547, later proceeding (Mo App) 1988 Mo App LEXIS 1548 and cert den (US) 107 L Ed 2d 36, 110 S Ct 69.

As to examination of witnesses, generally, and control by the court thereof, see 81 Am Jur 2d, Witnesses §§ 416 et seq.

22. People v McDermid (1st Dist) 162 Cal App 3d 770, 211 Cal Rptr 773.

23. People v Rodriguez (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433.

As to time of rebuttal, generally, and evidence introduced by a motion to reopen the case, see, respectively, §§ 369, 386 et seq.

24. McCue v State, 75 Tex Crim 137, 170 SW 280.

25. § 354.

with the burden of proof, is entitled to open the evidence and introduce all his evidence in chief; then, after defense counsel has introduced all his evidence in chief, the plaintiff should be confined to rebuttal evidence.²⁶

■■■■ **Reminder:** Counsel should always consult current state statutes or court rules governing the introduction of evidence in the applicable jurisdiction. If a novel or important evidence question arises at trial, counsel should research the issue and consider preparing a motion in limine or memorandum to file with the court.²⁷

The examination of a witness generally proceeds in the following order:

- Direct examination
- Cross-examination
- Redirect examination
- Recross-examination.

Unless for good cause the court otherwise directs, each phase of examination of a witness must be concluded before the succeeding phase begins.²⁸

■■■■ **Observation:** Although this order is typical, there may be cases where the order is reversed because the only litigated issue in the case casts the burden of proof on the defense.²⁹

While many courts are quite liberal in determinations relating to the order of proof and the presentation of evidence, and tolerant of the informality of many trial proceedings, adherence to appropriate trial procedure and order of presenting evidence cannot be perceived as error.³⁰

§ 357. Purpose of order of proof

The order of proof at trial is intended to insure the orderly presentation of evidence³¹ and has no effect on the burden of proof or of going forward with the evidence.³² It is a rule of practice, not of law, and it may be departed from whenever the court considers it necessary to promote justice.³³ It should not result in a defeat of justice.³⁴

26. *Bennett v Commonwealth*, 150 Ky 604, 150 SW 806; *State v Temple*, 302 NC 1, 273 SE2d 273; *Soliz v Ammerman*, 16 Utah 2d 11, 395 P2d 25; *McNeir v Greer-Hale Chinchilla Ranch*, 194 Va 623, 74 SE2d 165.

As to the proper scope of rebuttal, see §§ 372 et seq.

For discussion of the burden of proof as affecting order of proof, generally, see 29 Am Jur 2d, Evidence § 250.

Practice References: 5 Am Jur Trials 505, Mapping the Trial—Order of Proof §§ 1 et seq.

27. **Practice References:** *Danner & Toothman, Trial Practice Checklists* (1989) § 8:70.

As to motions in limine, generally, see §§ 94 et seq.

28. *People v McDermid* (1st Dist) 162 Cal App 3d 770, 211 Cal Rptr 773.

For discussion of reordering cross-examination in the court's discretion respecting the order of proof, see § 354.

As to examination of witnesses, generally, and control by the court thereof, see 81 Am Jur 2d, Witnesses §§ 416 et seq.

29. **Practice References:** *Carlson, Successful Techniques for Civil Trial* (1983) § 4:1.

30. *Stauffer Chemical Co. v Curry* (Wyo) 778 P2d 1083, 10 UCCRS2d 342.

31. *State v Lowery*, 318 NC 54, 347 SE2d 729.

32. *State v Temple*, 302 NC 1, 273 SE2d 273.

33. *State v Temple*, 302 NC 1, 273 SE2d 273.

34. *McCue v State*, 75 Tex Crim 137, 170 SW 280.

2. ORDER OF PROOF IN CASE IN CHIEF [§§ 358-363]

§ 358. Presentation of proof by parties, generally

Evidence which supports one's own case should be introduced during the presentation of the evidence in chief.³⁵

Because the order of proof may be varied as occasion requires,³⁶ inversion of the order of proof is not ground for reversal unless prejudice is shown,³⁷ particularly where deviating from the regular order of presentation is more effective in discerning the truth.³⁸

■■■■ Reminder: It is essential that trial attorneys preserve the testimony of their witnesses in the event of appellate review; thus, counsel must recognize when their witnesses are giving nonverbal testimony through gestures or vague references to maps, charts, diagrams, and physical objects and insure that such nonverbal testimony is reflected in the record.³⁹

§ 359. —Parties' discretion

As a general rule, the court will allow a party to present the evidence in his case in chief in the order which he prefers.⁴⁰ Thus, the order in which witnesses shall be examined rests largely in the discretion of the party, and by failing or refusing to examine a witness in the order selected by him, he does

35. *Shulman v Shulman*, 150 Conn 651, 193 A2d 525; *Buckingham v Buckingham* (Fla App D1) 492 So 2d 858, 11 FLW 1433; *Salko v Metropolitan Life Ins. Co.* (Richland Co) 52 Ohio App 367, 6 Ohio Ops 394, 21 Ohio L Abs 620, 3 NE2d 664; *Layton v Purcell* (Okla) 267 P2d 547.

36. § 354.

37. *Meyers v United States*, 84 App DC 101, 171 F2d 800, 11 ALR2d 1, cert den 336 US 912, 93 L Ed 1076, 69 S Ct 602; *People v Northcott*, 209 Cal 639, 289 P 634, 70 ALR 806; *People v McDermand* (1st Dist) 162 Cal App 3d 770, 211 Cal Rptr 773; *State v Greene*, 209 Conn 458, 551 A2d 1231, 80 ALR4th 315; *State v Perry*, 14 Conn App 526, 541 A2d 1245, app den 208 Conn 814, 546 A2d 281; *Bennett v Commonwealth*, 150 Ky 604, 150 SW 806; *Tyson v State*, 237 Miss 149, 112 So 2d 563, 72 ALR2d 1319; *State v Cummings*, 63 NM 337, 319 P2d 946; *State v Graven*, 54 Ohio St 2d 114, 8 Ohio Ops 3d 113, 374 NE2d 1370.

The trial court did not err in requiring defendant to present his evidence before the state put on its evidence during a hearing on defendant's motion to suppress, and there was no merit to defendant's contention that the inversion of the order of proof resulted in a shift of the burden of proof, since the order of proof is merely a matter of practice without legal effect and defendant was not prejudiced by the order of proof because it resulted in his having to

call one of the state's principal witnesses as his own. *State v Temple*, 302 NC 1, 273 SE2d 273.

38. *Williams v Madison County Wood Products, Inc.* (Mo App) 720 SW2d 447; *State v Brice*, 320 NC 119, 357 SE2d 353; *Great Plains Supply Co., Div. of Harvest States Cooperatives v Erickson* (ND) 398 NW2d 732 (by implication).

39. *Federal Pacific Electric Co. v Woodend* (Tex App Fort Worth) 735 SW2d 887.

40. *Ryder v State*, 100 Ga 528, 28 SE 246; *Dorn & McGinty v Cooper*, 139 Iowa 742, 117 NW 1, mod 139 Iowa 751, 118 NW 35; *Root v Kansas C.S.R. Co.*, 195 Mo 348, 92 SW 621; *Lewis v Schwenn*, 93 Mo 26, 2 SW 391; *Greenleaf v Bartlett*, 146 NC 495, 60 SE 419; *Commonwealth v Blount*, 387 Pa Super 603, 564 A2d 952, app den (Pa) 575 A2d 561.

A statute requiring a criminal defendant desiring to testify to do so before any other witness for the defense is an impermissible restriction on the right against self-incrimination. *Brooks v Tennessee*, 406 US 605, 32 L Ed 2d 358, 92 S Ct 1891.

As to the discretion of the court to require a party to prove one claim or defense prior to another, see § 354.

Practice References: Order of proof in plaintiff's and defendant's cases. *Carlson, Successful Techniques for Civil Trial* (1983), §§ 4.3, 4:4.

Sekuler, "Helping Jurors Understand Complex Cases," *Lawyers Alert* (July 9, 1990) p 9.

not lose the right to complain of the absence of the witness when he desires to call him.⁴¹

■■■■ *Recommendation:* In arranging the witnesses to build a case, the opening and closing witnesses are especially important, as a good first witness will impress the judge and jury with counsel's case and a good final witness will leave a lasting impression by delivering the closing words on behalf of the party. For this reason, it is recommended that the client testify first or last.⁴²

§ 360. Factors in determining order in case in chief; checklist

■■■■ *Checklist of factors to consider when determining the order of proof in the case in chief include:*

- Elements necessary to establish a prima facie claim or defense.
- What each witness is required to prove.
- Order in which witnesses are to be called.
 - Using a chronological order to enable factfinders to follow the presentation.
 - Beginning and ending with a good witness.
 - Placing poor witnesses in the middle where they do the least damage.
 - Considering the convenience of the witnesses.
 - Creating a strong impact near the end of trial to leave a fresh impression on the jurors during deliberations.
- Law applicable to the introduction of evidence.
 - Whether necessary testimony or documents will be in evidence before a certain witness testifies.⁴³
 - Presentation of evidence that will best inform the judge to make particular legal rulings in your favor.⁴⁴

Five general tactical principles should govern the planning of the order of proof:

- Present the evidence to tell a story in chronological order so that it may be easily understood by the jury.
- Plan the order of proof around the main theme or issues to be sustained or proved.
- Begin and end on a strong point.
- Present proof in a dramatic but sincere fashion.
- Project confidence at all times.⁴⁵

41. *Ryder v State*, 100 Ga 528, 28 SE 246.

The trial court did not err in allowing the government to reopen its case to enable a previously unavailable witness to testify where the motion was made the morning after the government had rested its case and before any additional evidence had been presented. *United States v Cephas* (ED Pa) 372 F Supp 1225, *affd* without op (CA3 Pa) 500 F2d 1400.

For discussion of direct and cross-examination of witnesses, generally, see 81 Am Jur 2d, *Witnesses* §§ 416 et seq.

Practice References: Order of witnesses. 5

Am Jur Trials 921, *Showing Pain and Suffering* §§ 68, 69.

42. Carlson, *Successful Techniques for Civil Trial* (1983) § 4.2.

43. § 362.

44. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) §§ 14:7-14:9.

45. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 14:6.

Successful defense litigation calls for increasingly bold approaches to the presentation of proof, resulting in departures from conventional strategy. For instance, defense attorneys try to defuse sympathy in personal injury cases by confronting the sympathy issue head on, as early as possible in the trial, instead of trying not to call attention to the plaintiff's injuries. Most defense attorneys contend that tactics aimed at confronting the emotions of the jurors improve the chances of an impartial panel.⁴⁶

■■■■ *Recommendation:* To defuse the jurors' sympathies, counsel might suggest in court that the plaintiff's attorney is deliberately exploiting sympathy to influence the jury; in cases involving severely injured plaintiffs, such as quadriplegics, defense attorneys should call witnesses similarly disabled and well-accomplished, to show that quadriplegics can be rehabilitated and contribute valuably to society.⁴⁷

§ 361. —Proof of separate and distinct matters

When the matters to be proved are distinct, although component parts of a demand or a defense, the order of their production is wholly immaterial.⁴⁸ But, where a defendant sets up several defenses, one of which is in abatement and the others to the merits, the court may require him to offer evidence in abatement first in order to save useless labor and expense if it is sustained.⁴⁹

Certain matters should be separately presented to the jury and the effect of each stated, as in the case of homicide, where the circumstances tending to prove the corpus delicti and those tending to prove the defendant's guilt should be separately presented and proved.⁵⁰ Evidence of the dollar value of reasonable attorneys' fees should not be submitted to the jury during the parties' presentation of the case in chief; rather, to avoid arbitrary determinations, a collateral hearing should be conducted wherein the issue of reasonable attorneys' fees may be considered.⁵¹

§ 362. —Proof precedent to admission of evidence

It is within the discretion of the trial judge to permit the introduction of evidence which depends for its admissibility and some preliminary showing upon counsel's assurance that such showing will be forthcoming.⁵²

If the admissibility of particular items of evidence is dependent upon the existence of other acts or facts, they should ordinarily be proved first, although it is for practical reasons within the sound discretion of the trial court to permit the evidence to be introduced out of order,⁵³ where admission

46. Practice References: Green, "Attorneys Try to Defuse Sympathy in Injury Cases," Wall Street Journal (April 4, 1990) p B1.

47. Practice References: Green, "Attorneys Try to Defuse Sympathy in Injury Cases," Wall Street Journal (April 4, 1990) p B1.

48. State v James, 96 NJL 132, 114 A 553, 16 ALR 1141.

49. Leonard v Flynn, 89 Cal 535, 26 P 1097.

50. 29 Am Jur 2d, Evidence § 530.

51. Davis v Owen (Warren Co) 26 Ohio App 3d 62, 26 Ohio BR 236, 498 NE2d 202.

52. § 324.

53. Donahoo v State (Ala App) 505 So 2d 1067, later app (Ala App) 552 So 2d 887; State v Devanney, 12 Conn App 288, 530 A2d 650; Shahan v Swan, 48 Ohio St 25, 26 NE 222.

For discussion of reception of proof offered technically late, generally, see § 355.

As to the requirement for admissibility of evidence of relevancy and materiality, see 29 Am Jur 2d, Evidence §§ 251 et seq.

is conditioned upon the proponent's promise subsequently to prove the requisite facts to connect the proof.⁵⁴

Ordinarily the proponents will not be expected, nor should they be permitted, over objection, to offer evidence at the time it is authenticated and marked for identification, where the marking and identification occur in the middle of the opposing party's case in chief.⁵⁵

§ 363. —Proof in anticipation of defense

Whether the plaintiff shall be permitted, as part of the evidence in chief, to anticipate defenses is a matter within the discretion of the trial court.⁵⁶ A party will be allowed as a part of the case in chief to give evidence to rebut in anticipation a matter which is foreshadowed by the defense or on which opposing counsel avows an intention to rely.⁵⁷ Further, where the defense, in its opening statement opens up a matter collateral to the issues at trial but helpful to the defense, the trial court may properly allow the plaintiff to rebut the matter in its evidence in chief or on rebuttal.⁵⁸

■■■■ Observation: The general rule that a party holding the affirmative of an issue is bound to present all of the evidence on the case in chief, before the close of the proof, and may not add to it by the device of rebuttal,⁵⁹ is not so easily applied when the evidence is negative of a potential defense.⁶⁰

Where the plaintiff's own evidence discloses an apparent defense to the action, the plaintiff should offer the evidence in avoidance in chief.⁶¹ But, a plaintiff is not required during the case in chief to anticipate an affirmative defense and to present responsive evidence; thus, in the absence of a stipulation that the plaintiff has no additional evidence to present relevant to the defense raised by evidence presented during the plaintiff's case in chief, the trial court should not grant a motion to dismiss at the close of the plaintiff's case.⁶²

54. *Donahoo v State* (Ala App) 505 So 2d 1067, later app (Ala App) 552 So 2d 887.

55. *Shulman v Shulman*, 150 Conn 651, 193 A2d 525.

For discussion of marking documents for introduction in evidence, see § 351.

As to authentication of evidence, see 29 Am Jur 2d, Evidence §§ 849 et seq.

56. *Mayer v Brensinger*, 180 Ill 110, 54 NE 159; *State v Neff*, 169 Kan 116, 218 P2d 248, cert den 340 US 866, 95 L Ed 632, 71 S Ct 90; *Fireman's Fund Ins. Co. v Bragg*, 76 Md App 709, 548 A2d 151.

A plaintiff need not rebut an affirmative defense until it puts on its rebuttal. *Capitol Plumbing & Heating Supply, Inc. v Van's Plumbing & Heating* (4th Dist) 58 Ill App 3d 173, 15 Ill Dec 617, 373 NE2d 1089.

Practice References: Anticipating defense. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof § 17.

57. *Mayer v Brensinger*, 180 Ill 110, 54 NE

159; *Commonwealth v Chance*, 174 Mass 245, 54 NE 551; *State v Hyde*, 234 Mo 200, 136 SW 316 (in homicide cases the prosecution is not bound to anticipate the defense or rely on the presumption of intent, and may offer evidence negating accident or mistake as part of its evidence in chief); *Wilson v Lockwood* (Mo App) 711 SW2d 545.

58. *Wilson v Lockwood* (Mo App) 711 SW2d 545.

As to the proper scope of rebuttal, generally, see §§ 372 et seq.

59. § 373.

60. *Yorita v Okumoto*, 3 Hawaii App 148, 643 P2d 820.

61. *Siemers v Meeme Mut. Home Protection Ins. Co.*, 143 Wis 114, 126 NW 669.

62. *Industrial Dev. Associates v Commercial Union Surplus Lines Ins. Co.*, 222 NJ Super 281, 536 A2d 787, cert den 111 NJ 632, 546 A2d 546 and cert den 111 NJ 632, 546 A2d 546.

There are many matters as to which a plaintiff has a right, in the first instance, to rely on a presumption, and as to those matters, the plaintiff may reserve the evidence until rebuttal, after specific evidence has been given by the defendant.⁶³

3. PROOF ADDUCED AFTER CASE IN CHIEF [§§ 364-394]

a. EVIDENCE IN CHIEF ON CROSS-EXAMINATION [§ 364]

§ 364. Generally

It is improper for a party during the cross-examination of one of his adversary's witnesses to endeavor to elicit evidence which goes to establish his own case.⁶⁴ Unless such testimony has been elicited from the witness upon his direct examination, justifying cross-examination in regard to it, the rule which precludes the introduction of evidence in chief on cross-examination of an adversary's witness especially precludes the introduction of documentary evidence during the cross-examination of a witness.⁶⁵ To permit the introduction of documentary evidence during the cross-examination of a witness would enable a party to procure the advantage of making the witness his own while precluding cross-examination by the adversary upon the points elicited.⁶⁶ However, the trial court may, in its discretion permit evidence to be introduced during the cross-examination of a witness.⁶⁷ And, cross-examination of an expert witness, differing from the cross-examination of a lay witness, is not necessarily restricted to matters related on direct examination.⁶⁸

63. *Commonwealth v Chance*, 174 Mass 245, 54 NE 551.

As to presumptions of fact and law, generally, see 29 Am Jur 2d, Evidence §§ 159 et seq.

64. *Shulman v Shulman*, 150 Conn 651, 193 A2d 525; *Salko v Metropolitan Life Ins. Co.* (Richland Co) 52 Ohio App 367, 6 Ohio Ops 394, 21 Ohio L Abs 620, 3 NE2d 664; *Layton v Purcell* (Okla) 267 P2d 547.

The trial court, in a criminal prosecution, properly sustained the state's objection to testimony, on cross-examination, as to what the defendant had told the witness at the time of arrest, since the defendant had not gone on the witness stand and therefore the evidence could not be corroborative. *State v Gatewood*, 23 NC App 211, 208 SE2d 425, cert den 286 NC 338, 210 SE2d 59.

As to reception of proof offered technically late, generally, see § 355.

For discussion of direct and cross-examination of witnesses, generally, see 81 Am Jur 2d, Witnesses §§ 416 et seq.

Practice References: Eliciting evidence on cross-examination. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof §§ 21, 22.

65. *Yazoo & M.V.R. Co. v Grant*, 86 Miss 565, 38 So 502; *Salko v Metropolitan Life Ins. Co.* (Richland Co) 52 Ohio App 367, 6 Ohio Ops 394, 21 Ohio L Abs 620, 3 NE2d 664.

66. *Salko v Metropolitan Life Ins. Co.* (Richland Co) 52 Ohio App 367, 6 Ohio Ops 394, 21 Ohio L Abs 620, 3 NE2d 664; *McGregor v Oregon R. Co.*, 50 Or 527, 93 P 465.

67. *Hannem v Pence*, 40 Minn 127, 41 NW 657.

A proffer of proof of a witness's bias is appropriate on cross examination, where the questioner proffers facts sufficient to permit the trial judge to evaluate whether the proposed question is probative of bias. *Jones v United States* (Dist Col App) 516 A2d 513.

68. *Stauffer Chemical Co. v Curry* (Wyo) 778 P2d 1083, 10 UCCRS2d 342.

b. REBUTTAL [§§ 365-376]

(1) DEFINITION AND PURPOSE [§ 365]

§ 365. Generally; impeachment distinguished

Rebuttal is evidence given to prove,⁶⁹ disprove, explain, repel, or contradict the evidence of the adversary party.⁷⁰

■■■■ Observation: Although a plaintiff often may anticipate the defendant's case in its initial proof,⁷¹ for tactical reasons, plaintiff may decide to present a rebuttal case, which has the advantages of avoiding an issue altogether, if the defendant chooses not to raise it, and of presenting the evidence after the defendant's, so it will be fresher in the jury's mind.⁷²

In respect to rebuttal, contradiction is directed to the accuracy of testimony and supplies additional factual evidence, unlike impeachment, which is directed to the credibility of a witness for the purpose of discrediting him and ordinarily furnishes no factual evidence.⁷³

69. *Nolte v Port Huron Area School Dist. Bd. of Education*, 152 Mich App 637, 394 NW2d 54 (where one party has introduced evidence to disprove a certain fact, the other may introduce evidence proving it).

70. *Sirotiak v H.C. Price Co. (Alaska)* 758 P2d 1271; *People v Gates*, 43 Cal 3d 1168, 240 Cal Rptr 666, 743 P2d 301, cert den 486 US 1027, 100 L Ed 2d 236, 108 S Ct 2005; *Jacksonville Racing Asso. v Harrison (Fla App D1)* 530 So 2d 1001, 13 FLW 1994; *Smallwood v Dick*, 114 Idaho 860, 761 P2d 1212; *Illinois State Toll Highway Authority v Grand Mandarin Restaurant, Inc. (2d Dist)* 189 Ill App 3d 355, 136 Ill Dec 370, 544 NE2d 1145, app den 129 Ill 2d 563, 140 Ill Dec 671, 550 NE2d 556; *People v Annerino (1st Dist)* 182 Ill App 3d 920, 131 Ill Dec 395, 538 NE2d 770; *Romanek-Golub & Co. v Anvan Hotel Corp. (1st Dist)* 168 Ill App 3d 1031, 119 Ill Dec 482, 522 NE2d 1341; *Hall v Northwestern University Medical Clinics (1st Dist)* 152 Ill App 3d 716, 105 Ill Dec 496, 504 NE2d 781; *Radio Distributing Co. v National Bank & Trust Co. (Ind App)* 489 NE2d 642, 63 ALR4th 695; *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398; *Nolte v Port Huron Area School Dist. Bd. of Education*, 152 Mich App 637, 394 NW2d 54; *Molkenbur v Hart (Minn App)* 411 NW2d 249; *D.K.L. v H.P.M. (Mo App)* 763 SW2d 212; *Wright v Forney*, 233 Neb 258, 444 NW2d 895; *Plumlee v State (Okla Crim)* 361 P2d 223; *Wells v C.M. Mays Lumber Co. (Okla App)* 754 P2d 888; *Valley Industries, Inc. v Cook (Tex App Dallas)* 767 SW2d 458, writ den (May 3, 1989) and reh'g of writ of error overr (Jun 7, 1989).

It is proper rebuttal to ask a question which explains an apparent contradiction. *State v Crowe*, 39 Mont 174, 102 P 579.

Where the defendant in a criminal prosecution brings out evidence tending to show that someone else committed the crime charged the state is entitled to introduce evidence in rebuttal. *State v Cody*, 40 NC App 735, 253 SE2d 642.

71. § 363.

72. **Practice References:** *Danner & Toothman, Trial Practice Checklists* (1989), § 8:200.

73. *D.K.L. v H.P.M. (Mo App)* 763 SW2d 212.

The trial judge was in error in excluding the plaintiff's expert testimony on the defendant's net worth which was offered to contradict testimony by the defendant that he was bankrupt, after the defendants had rested, as proper rebuttal testimony which was not required to be presented in the plaintiff's case in chief. *Rety v Green (Fla App D3)* 546 So 2d 410, 14 FLW 449, reh den (Fla App D3) 14 FLW 1829, review den (Fla) 553 So 2d 1166 and review den (Fla) 553 So 2d 1165, later app (Fla App D3) 15 FLW 1798.

The trial court properly allowed the rebuttal testimony of an attorney witness which expressed a legal opinion with respect to the defendants' breach of legal duty, and liability for bad faith and punitive damages, where, during cross-examination of the attorney witness, defense counsel read from the witness' deposition and brought out that at the time of such deposition, the witness had not seen any conduct on the part of the defendants that warranted punitive damages; thus, rehabilitation and a showing of the witness' present opinion became necessary only after cross-examination. *United Fire Ins. Co. v McClelland (Nev)* 780 P2d 193.

As to impeachment of witnesses, see 81 Am Jur 2d, Witnesses §§ 518 et seq.

Practice guide: While it is no doubt the better practice to permit a witness to testify prior to rebutting that testimony, it is not an abuse of discretion to permit a medical expert to criticize another expert's medical report before that expert testified, where he was subsequently given ample opportunity to rehabilitate himself by testifying as to the accuracy of his examination and findings, and where he had the last word on the matter.⁷⁴

The party calling a witness may rebut the testimony by counter testimony and may impeach the witness.⁷⁵

(2) DISCRETION OF COURT [§§ 366–371]

§ 366. Generally

The decision whether to admit⁷⁶ or to permit the presentation⁷⁷ or the introduction of evidence in rebuttal lies in the sound discretion of the trial court.⁷⁸

Factors to be considered by the court in determining whether to allow a rebuttal witness include whether the testimony is relevant⁷⁹ and whether the rebuttal witness is completely disinterested.⁸⁰

74. *Fireman's Fund Ins. Co. v Bragg*, 76 Md App 709, 548 A2d 151.

75. *Tokar v Crestwood Imports, Inc.* (1st Dist) 177 Ill App 3d 422, 126 Ill Dec 697, 532 NE2d 382, 1989-1 CCH Trade Cases ¶ 68412, 8 UCCRS2d 682.

The trial court did not abuse its discretion in denying defendants' objection to character evidence offered in rebuttal, where it was clear that the admissibility of the testimony was dependent in part on the defendants' use of the witness to discredit the plaintiff as part of their own presentation of evidence. *Blakely v Bates* (Iowa) 394 NW2d 320.

76. *Throckmorton v Holt*, 180 US 552, 45 L Ed 663, 21 S Ct 474; *State v Stevens* (App) 115 Idaho 457, 767 P2d 832; *Illinois State Toll Highway Authority v Grand Mandarin Restaurant, Inc.* (2d Dist) 189 Ill App 3d 355, 136 Ill Dec 370, 544 NE2d 1145, app den 129 Ill 2d 563, 140 Ill Dec 671, 550 NE2d 556; *Blakely v Bates* (Iowa) 394 NW2d 320; *Broussard v Olin Corp.* (La App 3d Cir) 546 So 2d 1301; *Combs v Hartford Ins. Co.* (La App 1st Cir) 544 So 2d 583, cert den (La) 550 So 2d 630; *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398; *Molkenbur v Hart* (Minn App) 411 NW2d 249; *Clark v Pascagoula* (Miss) 507 So 2d 70; *Massman v Helena*, 237 Mont 234, 773 P2d 1206; *Ivy v Wal-Mart Stores, Inc.* (Mo App) 777 SW2d 682; *Iota Management Corp. v Boulevard Invest. Co.* (Mo App) 731 SW2d 399; *State v Sanders* (Mo App) 714 SW2d 578, post-conviction proceeding (Mo App) 790 SW2d 497; *Lopez v State* (Nev) 769 P2d 1276; *State v Reynolds*, 41 NJ 163, 195 A2d 449, 1 ALR3d 1438, cert den 377 US 1000, 12 L Ed 2d 1050, 84 S Ct 1930, reh den 379 US 873, 13 L Ed 2d

80, 85 S Ct 22 and cert den 377 US 1000, 12 L Ed 2d 1050, 84 S Ct 1934, reh den 379 US 873, 13 L Ed 2d 81, 85 S Ct 23; *Morris v Bailey*, 86 NC App 378, 358 SE2d 120; *State v Chavis*, 24 NC App 148, 210 SE2d 555, cert den and app dismd 287 NC 261, 214 SE2d 434, cert den 423 US 1080, 47 L Ed 2d 91, 96 S Ct 868; *Jewelcor Jewelers & Distributors, Inc. v Corr*, 373 Pa Super 536, 542 A2d 72, app den 524 Pa 608, 569 A2d 1367; *Estate of Hannis v Ashland State General Hospital*, 123 Pa Cmwlth 390, 554 A2d 574, app den 524 Pa 632, 574 A2d 73; *Henning v Thomas*, 235 Va 181, 366 SE2d 109; *Nelson v Percy*, 149 Vt 168, 540 A2d 1035, reh den (Vt) 1988 Vt LEXIS 1; *State v Burns*, 53 Wash App 849, 770 P2d 1054, review gr 112 Wash 2d 1022 and affd 114 Wash 2d 314, 788 P2d 531; *Sturgeon v Celotex Corp.*, 52 Wash App 609, 762 P2d 1156.

Practice References: Rebuttal. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof §§ 23, 24.

Redirect examination. 5 Am Jur Trials 611, Presenting Plaintiff's Case § 28.

Rebuttal possibilities—Demonstrative evidence. 5 Am Jur Trials 695, Courtroom Semantics §§ 112-114.

77. *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398.

78. *Hall v Northwestern University Medical Clinics* (1st Dist) 152 Ill App 3d 716, 105 Ill Dec 496, 504 NE2d 781; *Capone v Cannon* (2d Dept) 150 App Div 2d 749, 542 NYS2d 199.

79. § 370.

80. *Strong v State*, 85 Ark 536, 109 SW 536

The determination of what evidence constitutes proper rebuttal rests in the trial court's discretion.⁸¹

§ 367. Right of rebuttal

Some courts have held that a party is entitled to introduce evidence to rebut that of his adversary,⁸² or have recognized, at least, circumstances in which a party may present rebuttal evidence as a matter of right and where the denial of that right would be an error of law.⁸³ For instance, when testimony bearing directly upon a material issue is first brought to light in the defendant's case in chief, the plaintiff must be provided with an opportunity to rebut, explain, or deny the testimony.⁸⁴

§ 368. Review of discretion

The trial court's discretion in admitting or excluding rebuttal will not be disturbed absent a clear abuse⁸⁵ or improvident exercise of such discretion.⁸⁶ Thus, absent such clear abuse, the exclusion⁸⁷ or admission of evidence to be introduced in rebuttal, which should have been offered in chief, will not be reviewed.⁸⁸

The general principle that in order to warrant a reversal the error must have been prejudicial to some substantial right of the appellant applies to rulings of the trial court on matters relating to examination on rebuttal.⁸⁹

§ 369. Time and order of rebuttal

Rebuttal testimony generally is introduced only after the parties have closed

(rebuttal allowed to show bias); *Reeder v Edward M. Chadbourne, Inc.* (Fla App D1) 338 So 2d 271.

81. § 372.

82. *Allen v Phoenix Assur. Co.*, 12 Idaho 653, 88 P 245; *Romanek-Golub & Co. v Anvan Hotel Corp.* (1st Dist) 168 Ill App 3d 1031, 119 Ill Dec 482, 522 NE2d 1341; *D.K.L. v H.P.M.* (Mo App) 763 SW2d 212.

83. *Underhill v Stephenson* (Ky) 756 SW2d 459; *Whittington v American Oil Co.* (La App 4th Cir) 508 So 2d 180, cert den (La) 512 So 2d 436; *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398 (party has a right to rebut new facts).

84. *Katz v Enzer* (Hamilton Co) 29 Ohio App 3d 118, 29 Ohio BR 133, 504 NE2d 427, motion overr.

85. *People v Dale* (1st Dist) 189 Ill App 3d 704, 136 Ill Dec 997, 545 NE2d 521, app den 129 Ill 2d 567, 140 Ill Dec 675, 550 NE2d 560; *Illinois State Toll Highway Authority v Grand Mandarin Restaurant, Inc.* (2d Dist) 189 Ill App 3d 355, 136 Ill Dec 370, 544 NE2d 1145, app den 129 Ill 2d 563, 140 Ill Dec 671, 550 NE2d 556; *Ivy v Wal-Mart Stores, Inc.* (Mo App) 777 SW2d 682; *Massman v Helena*, 237 Mont 234, 773 P2d 1206; *Capone v Gannon* (2d Dept)

150 App Div 2d 749, 542 NYS2d 199; *Sturgeon v Celotex Corp.*, 52 Wash App 609, 762 P2d 1156.

86. *Capone v Gannon* (2d Dept) 150 App Div 2d 749, 542 NYS2d 199; *Kapinos v Alvarado* (2d Dept) 143 App Div 2d 332, 532 NYS2d 416.

87. *Johnston v Jones*, 66 US 209, 17 L Ed 117; *Bain v Ft. Smith Light & Traction Co.*, 116 Ark 125, 172 SW 843; *Workman v Henrie*, 71 Utah 400, 266 P 1033, 58 ALR 1346.

88. *Goldsby v United States*, 160 US 70, 40 L Ed 343, 16 S Ct 216; *St. Paul Plow Works v Starling*, 140 US 184, 35 L Ed 404, 11 S Ct 803; *Robson v Barnett*, 241 Iowa 1066, 44 NW2d 382; *Marquardt v Kansas C.S.R. Co.* (Mo) 358 SW2d 49, 2 ALR3d 1311; *State v Dolbow*, 117 NJL 560, 189 A 915, 109 ALR 1488, app dismd 301 US 669, 81 L Ed 1334, 57 S Ct 943; *Verchereau v Jameson*, 122 Vt 189, 167 A2d 521.

For discussion of evidence in chief subsequently offered in rebuttal, see §§ 373 et seq.

89. *Reeder v Edward M. Chadbourne, Inc.* (Fla App D1) 338 So 2d 271; *Driscoll v Morris* (Fla App D3) 114 So 2d 314; *Parker v State*, 132 Tenn 327, 178 SW 438; *State v Kopacka*, 261 Wis 70, 51 NW2d 495, 30 ALR2d 476.

the evidence offered in chief.⁹⁰ The purpose of this rule is to assure an orderly presentation of evidence so that the trier of fact will not be confused, to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial, and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence.⁹¹

■■■ Recommendation: A sophisticated trial lawyer is always looking for a witness to save for a dramatic entrance on rebuttal. Because this is inevitably at the last stage of the trial, the impact of rebuttal testimony is far greater than the same testimony given in the case in chief. The tactical advantage of a good rebuttal witness requires preparation to anticipate the opposition's case so as to present a witness to effectively rebut.⁹²

Because the decision to admit evidence out of order is within the trial court's discretion, it is not an abuse of discretion for the court to allow parties to present evidence out of order in rebuttal.⁹³ Further, evidence tending to prove the plaintiff's case is admissible, in the discretion of the trial court, after the close of the defendant's case, even though it is not strictly rebutting.⁹⁴

In a bench trial, the court may allow rebuttal out of order as a matter of convenience to the witness, then defer ruling on an objection based on the order of rebuttal testimony until the close of the party's evidence, since the judge is able to decide the case regardless of the ruling, and unlike in a jury case, the testimony would not have a prejudicial effect.⁹⁵

§ 370. Determining relevancy of rebuttal

It is in the discretion of the trial court to determine the relevancy and

90. *Greenstein, Logan & Co. v Burgess Marketing, Inc.* (Tex App Waco) 744 SW2d 170.

For discussion of the usual order of proof between parties, see § 356.

As to evidence in chief offered in rebuttal, see § 373.

91. *People v Gates*, 43 Cal 3d 1168, 240 Cal Rptr 666, 743 P2d 301, cert den 486 US 1027, 100 L Ed 2d 236, 108 S Ct 2005.

In an action by a plaintiff injured by an intoxicated driver against the owner of a dram shop where the driver had purchased an alcoholic beverage, the trial court properly allowed a witness, one of three people in the van prior to its collision, to testify in rebuttal after the defendant's witnesses, notwithstanding that the alleged combined effect of the testimony was prejudicial to the defendant because it placed undue weight upon the testimony rendered, where the rebuttal witness was not a surprise witness, he had been subpoenaed, and defendant knew he would testify if he could be located. *Burkis v Contemporary Industries Midwest, Inc.* (Iowa App) 435 NW2d 397.

92. Practice References: Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 14:10.

93. *Iota Management Corp. v Boulevard Invest. Co.* (Mo App) 731 SW2d 399.

As to the discretion of the court to determine or alter the order of proof, generally, see § 354.

94. *Grand T.R. Co. v Richardson*, 91 US 454, 23 L Ed 356.

The trial court, after the plaintiff had rested its case in an action by a contractor against a homeowner to recover under a contract for the construction of a home without putting on any evidence of the cost of remedying the defects in the house, properly denied the defense's motion for directed verdict and permitted the plaintiff to put on, over objection, rebuttal evidence of the cost of repairing the defects, since a directed verdict may be granted only after all the evidence has been heard and the new "rebuttal" evidence provided the missing element for the plaintiff's substantial performance cause. *Uhlir v Golden Triangle Dev. Corp.* (Tex App Fort Worth) 763 SW2d 512.

95. *Tracy v Parish of Jefferson* (La App 5th Cir) 523 So 2d 266, cert den (La) 530 So 2d 569, reconsideration den (La) 532 So 2d 141.

For a checklist of factors to consider in ordering the presentation of the case in chief, see § 360.

admissibility of all evidence adduced at a trial.⁹⁶ Generally, rebuttal is relevant only by virtue of evidence introduced,⁹⁷ or by issues placed in conflict by the adverse party's evidence during the case in chief.⁹⁸ Thus, the relevance of rebuttal evidence should be tested by whether it is justified by the evidence which it is offered to rebut.⁹⁹ However, whether evidence could have been offered in the case in chief is not a test for the admissibility of evidence in rebuttal.¹

§ 371. Allowing testimony of undisclosed witness

The standard for determining whether a rebuttal witness should be allowed to testify when such witness's name was not timely identified is dependent on whether the testimony sought to be rebutted could reasonably have been anticipated prior to trial.² Thus, where the relevance and existence of rebuttal evidence is not known until the other side has presented its case, a trial court does not commit an abuse of discretion by permitting the rebuttal although

96. § 321.

97. *Combs v Hartford Ins. Co.* (La App 1st Cir) 544 So 2d 583, cert den (La) 550 So 2d 630; *Wells v C.M. Mays Lumber Co.* (Okla App) 754 P2d 888.

98. *Greenstein, Logan & Co. v Burgess Marketing, Inc.* (Tex App Waco) 744 SW2d 170.

Where no evidence was admitted at the trial to the testimony of the appellant or any other witness that the appellant had ever been fired for stealing, or that he had never sold stolen goods, evidence which defendants wanted to introduce showing that the appellant had previously been fired for theft and that he had sold stolen goods would not have been admissible as rebuttal testimony. *Butler v Flo-Ron Vending Co.*, 383 Pa Super 633, 557 A2d 730, app den 523 Pa 646, 567 A2d 650.

As to evidence in chief offered in rebuttal, see § 373.

99. *People v Holland*, 179 Mich App 184, 445 NW2d 206 (disagreed with on other grounds by *People v Mayfield*, 182 Mich App 282, 451 NW2d 583) and app den 434 Mich 888; *Nolte v Port Huron Area School Dist. Bd. of Education*, 152 Mich App 637, 394 NW2d 54; *Tucker v State* (Tex Crim) 578 SW2d 409 (the trial court did not err in refusing to allow rebuttal following the state's attempt to impeach defendant's character witnesses, where the evidence was not material to any fact issue); *Sturgeon v Celotex Corp.*, 52 Wash App 609, 762 P2d 1156.

Where, as part of its case in chief, defendant insecticide manufacturer introduced evidence that its insecticide received favorable results when tested in Colorado, the trial court properly allowed the introduction of rebuttal testimony by a farmer who testified to unfavorable results from the application of the insecticide to fields in the state of Nebraska, since the defendant opened the relevancy door by intro-

ducing evidence with respect to Colorado conditions. *Renze Hybrids, Inc. v Shell Oil Co.* (Iowa) 418 NW2d 634, 5 UCCRS2d 1331.

The trial court properly permitted the plaintiffs to present rebuttal evidence, in the form of a deposition of the treating physician, in a medical malpractice action, to contradict testimony from the defendants' expert that there was no indication in the record of the existence of the medical phenomena known as closed compartment syndrome, where the testimony in the deposition clearly stated that closed compartment syndrome had to be considered and thus the testimony directly answered the contention raised by the defendants that no such evidence existed. *Henning v Thomas*, 235 Va 181, 366 SE2d 109.

1. § 375.

2. *Sirotiak v H.C. Price Co.* (Alaska) 758 P2d 1271.

Where the facts are undisputed that only after the party presented its case in chief did it receive notice of the opponent's intention to call a rebuttal witness, who had been present during the trial and retained prior to the trial, and the party was notified only 3 days prior to the day the rebuttal witness was offered, allowing the party insufficient time to prepare for cross-examination, the trial court did not abuse its discretion in excluding the rebuttal witness's testimony. *Jewelcor Jewelers & Distributors, Inc. v Corr*, 373 Pa Super 536, 542 A2d 72, app den 524 Pa 608, 569 A2d 1367.

Defendants failed to show that the trial court abused its discretion in allowing plaintiffs' late-arriving witness to rebut their motion to dismiss, since they both knew of plaintiffs' intention to call such witness and the purpose of his testimony when they presented such motion to the court. *Bevins v King*, 147 Vt 203, 514 A2d 1044, 1 UCCRS2d 787.

the rebuttal witness was not listed prior to trial.³ However, a previously undisclosed rebuttal witnesses may offer testimony only about that which tends to counteract new matter offered by the adverse party.⁴

In determining whether to deny a party the right to call a rebuttal witness, the trial court should weigh the possibility of substantial prejudice against the denial of the right to present the proffered testimony.⁵

■■■■ Observation: While it is proper for a trial court to direct counsel for the respective parties to exchange lists of witnesses in advance of the commencement of the trial, such a rule should not be so applied as to create undue hardships or unduly to impede the development of pertinent facts before the jury.⁶

(3) SCOPE OF REBUTTAL [§§ 372-376]

§ 372. Generally

The proper scope of rebuttal⁷ and the determination of what evidence constitutes proper rebuttal are matters confined to the trial court's discretion.⁸ Thus, the trial court may allow or disallow testimony which is not strictly in rebuttal.⁹

3. *Radio Distributing Co. v National Bank & Trust Co.* (Ind App) 489 NE2d 642, 63 ALR4th 695.

As to the discretion of the trial court to permit additional evidence to be offered at any time when it clearly appears necessary to the due administration of justice, see § 355.

4. *Massman v Helena*, 237 Mont 234, 773 P2d 1206.

As to the proper scope of rebuttal, generally, see §§ 372 et seq.

5. *Reeder v Edward M. Chadbourne, Inc.* (Fla App D1) 338 So 2d 271 (the right to call a rebuttal witness should not be denied without good cause).

6. *Roark v Dempsey*, 159 W Va 24, 217 SE2d 913.

For discussion of the court's discretion to limit the number of witnesses, generally, see §§ 328 et seq.

As to the requirement of opposing counsel to apprise each other of witnesses intended to be called at trial, generally, see 81 Am Jur 2d, *Witnesses* § 4.

7. *Segalas v Moriarty* (1st Dist) 211 Cal App 3d 1583, 260 Cal Rptr 246, mod, reh den (1st Dist) 212 Cal App 3d 1081a, review den, op withdrawn by order of ct (Cal) 1989 Cal LEXIS 2471 and review den, op withdrawn by order of ct; *Wesby v State* (Ind) 535 NE2d 133; *Renze Hybrids, Inc. v Shell Oil Co.* (Iowa) 418 NW2d 634, 5 UCCRS2d 1331; *Re Green Charitable Trust*, 172 Mich App 298, 431 NW2d 492.

As to the discretion of the court in determining what is allowed in as rebuttal evidence, and factors considered therefor, see §§ 367 et seq.

8. *Sirotiak v H.C. Price Co.* (Alaska) 758 P2d 1271; *Brennan v Jones* (Mun Ct App Dist Col) 176 A2d 877; *Bott v Wendler*, 203 Kan 212, 453 P2d 100; *Molkenbur v Hart* (Minn App) 411 NW2d 249; *W. D. Miller Lumber Corp. v Miller*, 225 Or 427, 357 P2d 503, 100 ALR2d 376.

Practice References: Rebuttal. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof §§ 23, 24.

Redirect examination. 5 Am Jur Trials 611, Presenting Plaintiff's Case § 28.

Rebuttal possibilities—Demonstrative evidence. 5 Am Jur Trials 695, Courtroom Semantics §§ 112-114.

9. *Grand T.R. Co. v Richardson*, 91 US 454, 23 L Ed 356; *Cahaba Valley Dev. Corp. v Nuding* (Ala) 512 So 2d 46; *Gilbert v State* (Fla App D4) 547 So 2d 246, 14 FLW 1717, review den (Fla) 557 So 2d 35; *People v Ellison* (5th Dist) 89 Ill App 3d 1, 44 Ill Dec 381, 411 NE2d 350 (evidence of a bribe did not rebut defense of consent in prosecution for rape of a prostitute); *People v Smith*, 15 Mich App 173, 166 NW2d 504; *State v Dolbow*, 117 NJL 560, 189 A 915, 109 ALR 1488, app dismd 301 US 669, 81 L Ed 1334, 57 S Ct 943; *Uhlir v Golden Triangle Dev. Corp.* (Tex App Fort Worth) 763 SW2d 512.

Annotations: Reception of evidence to contradict or rebut matters judicially noticed, 45 ALR2d 1169.

Forms: Motion—To exclude witnesses and

Generally, rebuttal evidence properly is confined to new matters first introduced by the opposing party.¹⁰ For instance, in a criminal case, rebuttal evidence is made necessary by the defendant's case where he has introduced new evidence or made assertions that were not implicit in his denial of guilt.¹¹

§ 373. Evidence in chief on rebuttal

Generally, a party holding the affirmative of an issue is bound to present all of the evidence on the case in chief, before the close of the proof, and may not add to it by the device of rebuttal.¹² Thus, rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant and consist of nothing which could have been offered in chief.¹³

The trial judge may properly exclude rebuttal testimony if the testimony could have been presented during the offering party's case in chief,¹⁴ even in a

certain testimony. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 314.

10. *Sirotiak v H.C. Price Co.* (Alaska) 758 P2d 1271; *People v Gates*, 43 Cal 3d 1168, 240 Cal Rptr 666, 743 P2d 301, cert den 486 US 1027, 100 L Ed 2d 236, 108 S Ct 2005; *Broussard v Olin Corp.* (La App 3d Cir) 546 So 2d 1301; *Combs v Hartford Ins. Co.* (La App 1st Cir) 544 So 2d 583, cert den (La) 550 So 2d 630; *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398; *Massman v Helena*, 237 Mont 234, 773 P2d 1206; *State v Crowe*, 39 Mont 174, 102 P 579; *State v Boykin*, 298 NC 687, 259 SE2d 883, cert den 446 US 911, 64 L Ed 2d 264, 100 S Ct 1841; *Vasquez v Markin*, 46 Wash App 480, 731 P2d 510, review den 108 Wash 2d 1021.

A plaintiff in a strict liability action may introduce evidence of feasible alternative designs and, in such a case, the defendant may then introduce state of the art type evidence as a rebuttal evidence on that issue. *Connelly v General Motors Corp.* (1st Dist) 184 Ill App 3d 378, 132 Ill Dec 630, 540 NE2d 370, app den 136 Ill Dec 582, 545 NE2d 106.

11. *People v Gates*, 43 Cal 3d 1168, 240 Cal Rptr 666, 743 P2d 301, cert den 486 US 1027, 100 L Ed 2d 236, 108 S Ct 2005.

12. *Sirotiak v H.C. Price Co.* (Alaska) 758 P2d 1271; *Re Green Charitable Trust*, 172 Mich App 298, 431 NW2d 492 (by implication); *Crawford v Meridian* (Miss) 186 So 2d 250; *Kapinos v Alvarado* (2d Dept) 143 App Div 2d 332, 532 NYS2d 416; *Kennedy v Peninsula Hospital Center* (2d Dept) 135 App Div 2d 788, 522 NYS2d 671.

Unless the court in its discretion dispenses with this requirement, the defendant should introduce all his evidence in chief in support of his main case. *Brennan v Jones* (Mun Ct App Dist Col) 176 A2d 877; *Bennett v Commonwealth*, 150 Ky 604, 150 SW 806.

13. *Zacharie v Franklin*, 37 US 151, 9 L Ed

1035; *People v Schmitz*, 7 Cal App 330, 94 P 407, hear den by sup ct as reported in 7 Cal App 369, 94 P 419; *Hardesty v People*, 52 Colo 450, 121 P 1023; *Lockwood v Baptist Regional Health Services, Inc.* (Fla App D1) 541 So 2d 731, 14 FLW 874; *Laurent v Uniroyal, Inc.* (Fla App D3) 515 So 2d 1050, 12 FLW 2679, review den (Fla) 525 So 2d 879; *People v Crump*, 5 Ill 2d 251, 125 NE2d 615, 52 ALR2d 834, later app 12 Ill 2d 402, 147 NE2d 76, cert den 357 US 906, 2 L Ed 2d 1155, 78 S Ct 1148, reh den 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1382, habeas corpus proceeding (CA7 Ill) 807 F2d 1394, later proceeding (1st Dist) 181 Ill App 3d 58, 129 Ill Dec 825, 536 NE2d 875, app den 136 Ill Dec 583, 545 NE2d 107, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 16156 and (disagreed with by multiple cases as stated in *Viens v Daniels* (CA7 Ill) 871 F2d 1328, reh den (CA7) 1989 US App LEXIS 9017; *People v Castree*, 311 Ill 392, 143 NE 112, 32 ALR 357; *Commonwealth, Dept. of Highways v Ochsner* (Ky) 392 SW2d 446; *W.E. Roche Fruit Co. v Northern P.R. Co.*, 184 Wash 695, 52 P2d 325.

14. *Laurent v Uniroyal, Inc.* (Fla App D3) 515 So 2d 1050, 12 FLW 2679, review den (Fla) 525 So 2d 879; *Levin v Welsh Bros. Motor Service, Inc.* (1st Dist) 164 Ill App 3d 640, 115 Ill Dec 680, 518 NE2d 205, app den 119 Ill 2d 558, 119 Ill Dec 387, 522 NE2d 1246; *Radio Distributing Co. v National Bank & Trust Co.* (Ind App) 489 NE2d 642, 63 ALR4th 695; *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398; *People v Holland*, 179 Mich App 184, 445 NW2d 206 (disagreed with by *People v Mayfield*, 182 Mich App 282, 451 NW2d 583) and app den 434 Mich 888; *Re Green Charitable Trust*, 172 Mich App 298, 431 NW2d 492; *Gilmore v Luther McGill, Inc.* (Miss) 491 So 2d 863; *Katz v Enzer* (Hamilton Co) 29 Ohio App 3d 118, 29 Ohio BR 133, 504 NE2d 427, motion overr; *Kapinos v Alvarado* (2d Dept) 143 App Div 2d 332, 532 NYS2d 416; *Estate of*

bench trial.¹⁵

■■■■ Caution: The danger of tactically saving evidence in chief for rebuttal is that an appropriate objection will bar it altogether. For example, defense counsel may object on the ground that the question goes beyond the proper scope of rebuttal and allows the plaintiff to withhold part of its case in chief depriving the defense of the opportunity to address the evidence in its case in chief.¹⁶ Even relevant rebuttal evidence, which might properly have been introduced in the case in chief, may be excluded where its probative balance is substantially outweighed by the danger of unfair prejudice or unfair and harmful surprise.¹⁷

§ 374. —Rebuttal to bolster evidence in chief

Rebuttal is not intended to give a party an opportunity to tell his story twice or to present evidence that was proper in the case in chief.¹⁸ Thus, rebuttal should not be used as a corroboration,¹⁹ reiteration,²⁰ or repetition of the plaintiff's case in chief.²¹ Thus, evidence which is merely cumulative, adding nothing further to the position taken by previous witnesses,²² which merely bolsters²³ or supplements that already adduced by the plaintiff, is not admissible as rebuttal.²⁴

Hannis v Ashland State General Hospital, 123 Pa Cmwlth 390, 554 A2d 574, app den 524 Pa 632, 574 A2d 73.

A tape recording that plaintiffs offered as rebuttal evidence should have been offered as evidence in the case in chief as it obviously went to the major premise of their argument. *Wells v C.M. Mays Lumber Co.* (Okla App) 754 P2d 888.

For discussion of the court's discretion to limit rebuttal witnesses, generally, see § 344.

15. *Re Marriage of Kaplan* (1st Dist) 149 Ill App 3d 23, 102 Ill Dec 719, 500 NE2d 612.

16. *Carlson, Successful Techniques for Civil Trial* (1983) § 2:15.

For discussion of the tactical advantage of rebuttal evidence, see § 369.

17. *Wells v C.M. Mays Lumber Co.* (Okla App) 754 P2d 888.

18. *Wright v Forney*, 233 Neb 258, 444 NW2d 895.

19. *Sirotiak v H.C. Price Co.* (Alaska) 758 P2d 1271; *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398 (there is no right to present rebuttal evidence that only supports a party's affirmative case); *Wells v C.M. Mays Lumber Co.* (Okla App) 754 P2d 888; *Hughes v State*, 126 Tenn 40, 148 SW 543.

20. *Vasquez v Markin*, 46 Wash App 480, 731 P2d 510, review den 108 Wash 2d 1021.

21. *Catchings v Glendale* (App) 154 Ariz 420, 743 P2d 400; *Laurent v Uniroyal, Inc.* (Fla App

D3) 515 So 2d 1050, 12 FLW 2679, review den (Fla) 525 So 2d 879, later proceeding (Fla App D3) 549 So 2d 1154, 14 FLW 2370; *Broussard v Olin Corp.* (La App 3d Cir) 546 So 2d 1301; *Wells v C.M. Mays Lumber Co.* (Okla App) 754 P2d 888; *Molkenbur v Hart* (Minn App) 411 NW2d 249; *Wright v Forney*, 233 Neb 258, 444 NW2d 895; *Nelson v Percy*, 149 Vt 168, 540 A2d 1035, reh den (Vt) 1988 Vt LEXIS 1.

The trial court, in a medical malpractice action, properly refused to allow the plaintiff to rebut defense expert's testimony that the normal range of hemoglobin was 5 rather than .5 as the plaintiff's expert had testified, where the proposed rebuttal evidence was merely a repeat of earlier testimony in the plaintiffs' case in chief. *Vasquez v Markin*, 46 Wash App 480, 731 P2d 510, review den 108 Wash 2d 1021.

Practice References: Defendant's case, rebuttal, and surrebuttal. *Danner & Toothman, Trial Practice Checklists* (1989), § 8:200.

22. *Schneider v Cessna Aircraft Co.* (App) 150 Ariz 153, 722 P2d 321, CCH Prod Liab Rep ¶ 10743; *Verrastro v Middlesex Ins. Co.*, 207 Conn 179, 540 A2d 693; *Laurent v Uniroyal, Inc.* (Fla App D3) 515 So 2d 1050, 12 FLW 2679, review den (Fla) 525 So 2d 879, later proceeding (Fla App D3) 549 So 2d 1154, 14 FLW 2370; *Clark v Pascagoula* (Miss) 507 So 2d 70; *Nelson v Percy*, 149 Vt 168, 540 A2d 1035, reh den (Vt) 1988 Vt LEXIS 1.

23. *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398; *Wells v C.M. Mays Lumber Co.* (Okla App) 754 P2d 888.

§ 375. —Rebuttal evidence admissible in chief

Evidence offered in rebuttal is not automatically excluded just because it would have been more properly admitted in the case in chief.²⁵ Whether evidence could have been admitted in the case in chief is not a test of admissibility of evidence in rebuttal.²⁶ Thus, the fact that testimony might have been useful and usable in the case in chief does not necessarily preclude its use in rebuttal.²⁷

§ 376. Rebuttal to or by inadmissible evidence

Where the court has permitted a party to introduce incompetent evidence, over objection, the party injured thereby may rebut such evidence without waiving any rights,²⁸ even, according to some decisions, by evidence which is itself incompetent,²⁹ although the admission of irrelevant evidence on one side does not justify the admission of irrelevant evidence on the other.³⁰

A party cannot justify the introduction of incompetent evidence on the ground that thereafter the adverse party offered evidence to rebut such incompetent evidence.³¹ Nor may incompetent evidence corroborate other incompetent evidence.³² Unless the proponent withdraws or strikes out im-

24. *Broussard v Olin Corp.* (La App 3d Cir) 546 So 2d 1301; *Ivy v Wal-Mart Stores, Inc.* (Mo App) 777 SW2d 682; *Boyd v Hicks* (Tenn App) 774 SW2d 622 (highly technical photographs to illustrate rebuttal testimony were properly excluded).

As to the discretion of the court to limit the number of witnesses with respect to cumulative testimony, generally, see § 337.

25. *Strong v State* (Ala App) 538 So 2d 815; *People v Lewis*, 124 Cal 551, 57 P 470; *Molk-enbur v Hart* (Minn App) 411 NW2d 249; *Uhlir v Golden Triangle Dev. Corp.* (Tex App Fort Worth) 763 SW2d 512.

26. *People v Bettistea*, 173 Mich App 106, 434 NW2d 138, later app 181 Mich App 194, 448 NW2d 781 (disagreed with by *People v Hampton*, 184 Mich App 434, 459 NW2d 309, vacated 436 Mich 883, 461 NW2d 372) and app den 437 Mich 868 and cert den (US) 59 USLW 3702.

27. *Throckmorton v Holt*, 180 US 552, 45 L Ed 663, 21 S Ct 474; *St. Paul Plow Works v Starling*, 140 US 184, 35 L Ed 404, 11 S Ct 803; *National Surety Corp. v Heinbokel* (CA3 Pa) 154 F2d 266; *State v Sorrell* (App) 116 Idaho 966, 783 P2d 305; *People v Crump*, 5 Ill 2d 251, 125 NE2d 615, 52 ALR2d 834, later app 12 Ill 2d 402, 147 NE2d 76, cert den 357 US 906, 2 L Ed 2d 1155, 78 S Ct 1148, reh den 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1382; *Re Marriage of Kaplan* (1st Dist) 149 Ill App 3d 23, 102 Ill Dec 719, 500 NE2d 612; *Blakely v Bates* (Iowa) 394 NW2d 320; *Evans v Commonwealth*, 230 Ky 411, 19 SW2d 1091, 66 ALR 360; *People v Bettistea*, 173 Mich App 106, 434 NW2d 138, later app 181 Mich App

194, 448 NW2d 781 (disagreed with by *People v Hampton*, 184 Mich App 434, 459 NW2d 309, vacated 436 Mich 883, 461 NW2d 372) and app den 437 Mich 868 and cert den (US) 59 USLW 3702; *Wells v C.M. Mays Lumber Co.* (Okla App) 754 P2d 888.

The admission in a criminal prosecution of evidence as a part of the rebuttal, when such evidence would have been properly admissible in chief, rests in the sound discretion of the trial judge, and will not be interfered with in the absence of gross abuse of that discretion. *Goldsby v United States*, 160 US 70, 40 L Ed 343, 16 S Ct 216; *State v Marcus*, 240 Iowa 116, 34 NW2d 179; *State v Neff*, 169 Kan 116, 218 P2d 248, cert den 340 US 866, 95 L Ed 632, 71 S Ct 90; *Oliver v State*, 208 Tenn 692, 348 SW2d 325.

28. *Smith v State*, 247 Ala 354, 24 So 2d 546; *Goodale v Murray*, 227 Iowa 843, 289 NW 450, 126 ALR 1121; *Jones v Bailey*, 246 NC 599, 99 SE2d 768; *Peevyhouse v Garland Coal & Mining Co.* (Okla) 382 P2d 109, cert den 375 US 906, 11 L Ed 2d 145, 84 S Ct 196.

As to what constitutes waiver of objections, generally, see §§ 412 et seq.

29. *State v Asbury*, 172 Iowa 606, 154 NW 915.

As to motions to strike evidence, generally, see §§ 461 et seq.

30. *San Diego Land & Town Co. v Neale*, 88 Cal 50, 25 P 977.

31. *Lester v Gay*, 217 Ala 585, 117 So 211, 59 ALR 1561.

32. *Slocinski v Radwan*, 83 NH 501, 144 A 787, 63 ALR 643.

proper evidence, it is proper to overrule his objection to immaterial testimony offered to rebut such evidence.³³ Because the admission of curative evidence rests in the discretion of the court, evidence adduced to rebut or to explain earlier inadmissible evidence must be evidence of the same type or character and the rebutting party must not have objected to the introduction of the evidence sought to be rebutted.³⁴

Where one party introduces proper evidence as to a particular fact, the other party may introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be inadmissible on grounds of incompetence or irrelevance had it been offered initially.³⁵

The fact that the opposing party failed to exercise the opportunity of rebuttal does not render inadmissible evidence admissible, or otherwise render the admission of such evidence harmless.³⁶ But, where evidence was offered and excluded as not competent in chief, if it is proper rebuttal, it must be then offered or no advantage can be taken of its exclusion.³⁷

C. SURREBUTTAL [§§ 377, 378]

§ 377. Generally; right of reply to rebuttal

As a general rule, a party has no right to reply to evidence given on rebuttal, or, to introduce evidence by way of surrebuttal,³⁸ unless facts are introduced in the case for the first time on the rebuttal offered by the adversary, that is, unless new matter has been introduced in the rebuttal.³⁹

■■■■ Observation: If the plaintiff presents a rebuttal case, the defendant has the option, in most courts, of presenting a surrebuttal case, and some judges may allow additional iterations, if necessary.⁴⁰

While it has been held that surrebuttal is a matter of right to deny, explain, or avoid new matters,⁴¹ it has also been stated that surrebuttal by the

33. *State v Petty*, 32 Nev 384, 108 P 934.

As to grounds for a motion to strike, see §§ 479 et seq.

34. *Bailey v Valtec Hydraulics, Inc.* (Mo App) 748 SW2d 805.

35. *Nolte v Port Huron Area School Dist. Bd. of Education*, 152 Mich App 637, 394 NW2d 54; *Morris v Bailey*, 86 NC App 378, 358 SE2d 120.

Annotations: Propriety, in federal court action, of attack on witness' credibility by rebuttal evidence pertaining to cross-examination testimony on collateral matters, 60 ALR Fed 8.

36. *Drexler v Seaboard S.R., Inc.* (Ala) 530 So 2d 754.

37. *Shinners v Proprietors of Locks & Canals on Merrimack River*, 154 Mass 168, 28 NE 10.

38. *First Nat. Bank v Vagg*, 65 Mont 34, 212 P 509.

39. *Chateaugay Ore & Iron Co. v Blake*, 144 US 476, 36 L Ed 510, 12 S Ct 731; *United States v King* (CA4 NC) 879 F2d 137, 28 Fed Rules Evid Serv 550, cert den (US) 107 L Ed

2d 206, 110 S Ct 257; *Timmons v State*, 13 Ga App 376, 79 SE 216; *Ross v Danter Associates, Inc.* (3d Dist) 102 Ill App 2d 354, 242 NE2d 330; *State v Bellard*, 132 La 491, 61 So 537; *State v Forsha*, 190 Mo 296, 88 SW 746; *Commonwealth v Beck*, 522 Pa 194, 560 A2d 1370.

The court properly may exclude surrebuttal testimony that is merely cumulative, that is testimony substantially to the same effect as that having come in on defendant's case. *United States v Compania Cubana De Aviacion, S.A.* (CA5 Fla) 224 F2d 811.

Practice References: Surrebuttal. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof §§ 23, 24.

Forms: Motion—To exclude witnesses and certain testimony. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 314.

40. **Practice References:** Danner & Toothman, Trial Practice Checklists (1989) § 8:200.

41. *Levin v Welsh Bros. Motor Service, Inc.* (1st Dist) 164 Ill App 3d 640, 115 Ill Dec 680, 518 NE2d 205, app den 119 Ill 2d 558, 119 Ill Dec 387, 522 NE2d 1246.

defendant is not a matter of right, but may be allowed at the court's discretion.⁴²

A party who has already denied, on examination, the substance of evidence offered on rebuttal, is not entitled to surrebuttal thereon.⁴³

§ 378. Discretion of court as to surrebuttal

The trial court has considerable discretion concerning the presentation of surrebuttal evidence,⁴⁴ whether it is to respond to an attack, on rebuttal, of the defendant's character;⁴⁵ to admit evidence which properly could have been admitted in the case in chief;⁴⁶ to allow the recalling of an expert witness;⁴⁷ to allow a defendant to repeat his own testimony in surrebuttal;⁴⁸ or to allow surrebuttal characterized and procedurally offered as rebuttal.⁴⁹ And, although a court has no right arbitrarily to refuse to hear surrebuttal testimony,⁵⁰ even where offers of proof in surrebuttal were taken as procedurally sufficient and definite and specific, the court may in its sound discretion exclude them.⁵¹

■■■ Observation: Although great liberality is allowed in this area, occasionally a strong, convincing, and successful argument can be made that the proffered surrebuttal evidence should instead have been offered in the proponent's case in chief and is being offered to take unfair advantage.⁵²

Where the accused rests the case in chief without taking the stand, and offers himself as a witness after the state's evidence is in, the accused's testimony is properly confined to surrebuttal of the rebuttal evidence introduced by the state.⁵³

d. REOPENING OF CASE [§§ 379-394]

(1) DISCRETION OF COURT TO REOPEN EVIDENCE [§§ 379-381]

§ 379. Generally

The reopening of a case to receive additional evidence is a matter within the discretion of the trial court and will not be disturbed on appeal except for an

42. § 378.

43. *State v Welsh*, 232 Neb 219, 440 NW2d 225 (direct examination); *State v Sutton*, 231 Neb 30, 434 NW2d 689 (cross-examination).

44. *St. Paul Plow Works v Starling*, 140 US 184, 35 L Ed 404, 11 S Ct 803; *People v Williams* (1st Dist) 180 Ill App 3d 294, 129 Ill Dec 228, 535 NE2d 993; *Sullivan v Levin* (Ky) 555 SW2d 261; *Ray v Shemwell*, 174 Ky 54, 191 SW 662; *Whittington v American Oil Co.* (La App 4th Cir) 508 So 2d 180, cert den (La) 512 So 2d 436; *Moe v Blue Springs Truck Lines, Inc.* (Mo) 426 SW2d 1; *State v Sanders* (Mo App) 714 SW2d 578, post-conviction proceeding (Mo App) 790 SW2d 497.

Annotations: Propriety of Federal District Court's allowance or denial of introduction of surrebuttal evidence in criminal trial, 71 ALR Fed 94.

45. *Ray v Shemwell*, 174 Ky 54, 191 SW 662.

46. *Levin v Welsh Bros. Motor Service, Inc.*

(1st Dist) 164 Ill App 3d 640, 115 Ill Dec 680, 518 NE2d 205, app den 119 Ill 2d 558, 119 Ill Dec 387, 522 NE2d 1246.

47. *Italian Fisherman, Inc. v Commercial Union Assur. Co.*, 215 NJ Super 278, 521 A2d 912, cert den 107 NJ 152, 526 A2d 211 and (disagreed with by multiple cases as stated in *Sassano v BLT Discovery, Inc.*, 245 NJ Super 539, 586 A2d 307).

48. *State v Sutton*, 231 Neb 30, 434 NW2d 689.

49. *Morris v Bailey*, 86 NC App 378, 358 SE2d 120.

50. *United States v Compania Cubana De Aviacion, S.A.* (CA5 Fla) 224 F2d 811.

51. *Sullivan v Levin* (Ky) 555 SW2d 261.

52. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 14:11.

53. *State v Forsha*, 190 Mo 296, 88 SW 746.

abuse of discretion,⁵⁴ such as where it clearly appears that reopening the case is necessary to the due administration of justice.⁵⁵ For instance, an error of the court in refusing to rule upon objections to jurisdiction and the admission of evidence is cured by reopening the case and entering the rulings upon the objections, and giving the objector an opportunity to offer evidence in defense.⁵⁶ It may amount to an abuse of discretion not to permit a party to reopen its case in such circumstances,⁵⁷ particularly where the party has acted

54. *Zenith Radio Corp. v Hazeltine Research, Inc.*, 401 US 321, 28 L Ed 2d 77, 91 S Ct 795, 1971 CCH Trade Cases ¶ 73484, 14 FR Serv 2d 1169, reh den 401 US 1015, 28 L Ed 2d 552, 91 S Ct 1247; *United States v Bayer*, 331 US 532, 91 L Ed 1654, 67 S Ct 1394, reh den 332 US 785, 92 L Ed 368, 68 S Ct 29; *Ames v Quimby*, 106 US 342, 27 L Ed 100, 1 S Ct 116; *Philadelphia & T.R. Co. v Stimpson*, 39 US 448, 10 L Ed 535; *United States v Cephas* (ED Pa) 372 F Supp 1225, affd without op (CA3 Pa) 500 F2d 1400; *State v Favors*, 92 Ariz 147, 375 P2d 260; *People v Ceja* (5th Dist) 205 Cal App 3d 1296, 253 Cal Rptr 132, review den; *Rosenfeld, Meyer & Susman v Cohen* (2nd Dist) 191 Cal App 3d 1035, 237 Cal Rptr 14; *Brocke v Naseath*, 134 Cal App 2d 23, 285 P2d 291, 51 ALR2d 1083; *Caccavale v Hospital of St. Raphael*, 14 Conn App 504, 541 A2d 893, app den 208 Conn 812, 545 A2d 1107; *Payne v Jones & Kolb*, 190 Ga App 62, 378 SE2d 467; *Pickelsimer v Traditional Builders, Inc.*, 183 Ga App 709, 359 SE2d 719; *United States Dept. of Housing & Urban Dev. v Anderson* (1st Dist) 178 Ill App 3d 752, 127 Ill Dec 837, 533 NE2d 919; *Greater Peoria Sanitary & Sewage Disposal Dist. v Hermann* (3d Dist) 153 Ill App 3d 398, 106 Ill Dec 222, 505 NE2d 769; *Re Marriage of Suarez* (2d Dist) 148 Ill App 3d 849, 102 Ill Dec 85, 499 NE2d 642; *Crane v Cedar R. & I.C.R. Co. (Iowa)* 160 NW2d 838, affd 395 US 164, 23 L Ed 2d 176, 89 S Ct 1706; *State v Anderson*, 209 Iowa 510, 228 NW 353, 67 ALR 1366; *Guilbeau v Shelter Mut. Ins. Co. (La App 3d Cir)* 549 So 2d 1250; *American Bank & Trust Co. v McDowell* (La App 2d Cir) 545 So 2d 1211; *Bricks Unlimited, Inc. v Stepter* (La App 4th Cir) 538 So 2d 1147; *Oster v New Orleans* (La App 4th Cir) 528 So 2d 792, cert den (La) 533 So 2d 21; *Richard v Tarzetti* (La App 3d Cir) 510 So 2d 1361; *Cummings v Wafer* (La App 2d Cir) 499 So 2d 184; *Bonner v Watkins Motor Lines, Inc. (La App 2d Cir)* 494 So 2d 1363; *State v Burbank*, 156 Me 269, 163 A2d 639, 95 ALR2d 166; *Stewart v Eaton*, 287 Mich 466, 283 NW 651, 120 ALR 1354; *Security State Bank v Dieltz* (Minn App) 408 NW2d 186; *Montpetit v Commissioner of Public Safety* (Minn App) 392 NW2d 663; *Re Estate of Mapes* (Mo) 738 SW2d 853, later app (Mo App) 789 SW2d 44; *Iota Management Corp. v Boulevard Invest. Co. (Mo App)* 731 SW2d 399; *Stark v Circle K Corp.*, 230 Mont 468, 751 P2d 162, 3 BNA IER Cas 53; *State v*

Menke, 25 NJ 66, 135 A2d 180; *Di Matteo v County of Dona Ana* (App) 104 NM 599, 725 P2d 575, later proceeding (App) 109 NM 374, 785 P2d 285; *Lagana v French* (2d Dept) 145 App Div 2d 541, 536 NYS2d 95; *State v Gleason*, 24 NC App 732, 212 SE2d 213; *Torkelson v Byrne*, 68 ND 13, 276 NW 134, 113 ALR 1213 (denial proper); *Arbogast v Pilot Rock Lumber Co.*, 215 Or 579, 336 P2d 329, 72 ALR2d 712 (denial proper); *Noble C. Quandt Co. v Slough Flooring, Inc.*, 384 Pa Super 236, 558 A2d 99; *Oliver v State*, 208 Tenn 692, 348 SW2d 325; *Uhlir v Golden Triangle Dev. Corp. (Tex App Fort Worth)* 763 SW2d 512; *Fisher v Kerr County* (Tex App San Antonio) 739 SW2d 434; *Turner v Lone Star Industries, Inc. (Tex App Houston (1st Dist))* 733 SW2d 242; *MCI Telecommunications Corp. v Tarrant County Appraisal Dist. (Tex App Fort Worth)* 723 SW2d 350; *Strong v Sunset Copper Co.*, 9 Wash 2d 214, 114 P2d 526, 135 ALR 423 (denial proper).

A motion to reopen a case for the purpose of cross-examining a witness for impeachment purposes is addressed to the sound discretion of the trial court, and that court's ruling thereon will not be disturbed in the absence of a manifest abuse of such discretion. *Torkelson v Byrne*, 68 ND 13, 276 NW 134, 113 ALR 1213.

Practice References: Reopening the case. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof § 29.

55. *Bowman v Hall*, 83 Ariz 56, 316 P2d 484; *Cummings v Wafer* (La App 2d Cir) 499 So 2d 184; *Department of Human Services v Thi-beault (Me)* 561 A2d 486; *Kennedy v Peninsula Hospital Center* (2d Dept) 135 App Div 2d 788, 522 NYS2d 671; *Vital v State* (Tex Crim) 523 SW2d 662.

56. *Haaren v Mould*, 144 Iowa 296, 122 NW 921.

57. *Silber v Cn'R Industries of Jacksonville, Inc. (Fla App D1)* 526 So 2d 974, 13 FLW 1281.

It is an abuse of discretion for the trial court to refuse to allow the reopening of proof, where the evidence was inadvertently omitted, it was necessary to an accurate adjudication, where reopening would serve an honest purpose by giving the court a more complete picture, and where reopening would not create

in good faith, and where no prejudice would result to the other party.⁵⁸

The court's discretion should be liberally exercised to permit both sides to fully develop their case.⁵⁹ However, the trial court's discretion to reopen a case for the introduction of additional evidence is not unlimited, and it may allow reopening only where this can be done without injustice to the other party.⁶⁰

Greater liberty should be allowed in the matter of opening the proofs when the case is tried before a court without a jury.⁶¹

§ 380. Characterization of receipt of additional evidence

Regardless of whether a trial court's decision to take further evidence in a supplemental hearing is denominated as a reopening of the case, a new trial, or a continuance, that decision rests within the trial court's discretion and will not be set aside on appeal absent an abuse of that discretion.⁶² However, where the trial court denies a request to reopen the defense case because it applies standards applicable to a motion for a new trial based on after-discovered evidence, the court commits an abuse of discretion where the evidence was both relevant and important.⁶³

§ 381. Federal court practice

Occasionally a party will discover new evidence or evidence that was not previously available after the trial record has closed. In a jury trial in federal court, the only possible way to reopen the record for the introduction of such evidence is to move for a new trial under Federal Rule of Civil Procedure 59 or for relief from judgment under Rule 60(b),⁶⁴ or, in a criminal case, under Federal Rule of Criminal Procedure 33.⁶⁵

■■■■ Observation: In a bench trial, the judge may grant permission to reopen the record so long as the opposing party has a chance to rebut the new evidence, under Federal Rule of Civil Procedure 59(a). In bench trials, a "new trial" frequently consists of reopening the record for new evidence and even new arguments.⁶⁶

any unfair disadvantage. *Department of Human Services v Thibeault* (Me) 561 A2d 486.

58. *Cooke Trust Co. v Edwards*, 43 Hawaii 226; *People use of E.P. Brady & Co. v Gilliland*, 354 Mich 247, 92 NW2d 289; *Virginia R. & P. Co. v Gorsuch*, 120 Va 655, 91 SE 632.

59. *Turner v Lone Star Industries, Inc.* (Tex App Houston (1st Dist)) 733 SW2d 242.

60. § 382.

61. *Re Marriage of Suarez* (2d Dist) 148 Ill App 3d 849, 102 Ill Dec 85, 499 NE2d 642.

Practice References: *Danner & Tothman, Trial Practice Checklists* (1989) § 8:250.

62. *Tom Beuchler Constr., Inc. v Williston* (ND) 392 NW2d 403, later app (ND) 413 NW2d 336.

A premature motion for new trial may be construed as a motion to reopen the case for additional evidence. *American Bank & Trust Co. v McDowell* (La App 2d Cir) 545 So 2d 1211.

As to the effect of continuance on a motion to reopen, generally, see § 388.

63. *Beneshunas v Independence Life & Acci. Ins. Co.*, 354 Pa Super 391, 512 A2d 6.

As to the court's discretion with respect to reopening for material evidence, see § 383.

For discussion of reopening the record for new evidence in a motion for a new trial, see 58 Am Jur 2d, New Trial §§ 480, 489, 506; as to proof of diligence, see 58 Am Jur 2d, New Trial § 548.

64. 58 Am Jur 2d, New Trial § 489.

65. 58 Am Jur 2d, New Trial § 492.

66. **Practice References:** *Danner & Tothman, Trial Practice Checklists* (1989), § 8:250.

For federal court practice with respect to motions to reopen the record, including time in which to file motions, see 25 Federal Procedure, L Ed, New Trial §§ 58:1-58:3, 58:8-58:12 (time of filing), 58:19, 58:39-58:44.

(2) DETERMINATION OF MOTION TO REOPEN [§§ 382-385]

§ 382. Factors considered, generally

A court should not reopen a case except for good reasons and on proper showing.⁶⁷ Thus, once the evidence has been closed, a case will be reopened to permit a party to introduce further expert evidence only under very extraordinary circumstances and for good cause.⁶⁸ The exigencies of each particular case go far in controlling the discretion of the court.⁶⁹

Factors to be taken into consideration in allowing a party to reopen a case to introduce new evidence include:

- The failure to introduce the evidence occurred because of inadvertence,⁷⁰ calculated risk,⁷¹ or the court's mistake.⁷²
- The surprise or unfair prejudice inuring to the opponent by the new

Annotations: Time limitations in connection with motions for new trial under Rule 33 of Federal Rules of Criminal Procedure, 51 ALR Fed 482.

Motions for new trial: time limitations under Rule 59(b) of Federal Rules of Civil Procedure, 45 ALR Fed 104.

Forms: Notice of motion—To set aside submission and reopen case—Newly discovered evidence. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 76.

Affidavit—Of attorney—In support of motion to set aside submission and reopen case—Newly discovered evidence. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 77.

67. *Denman v Brennamen*, 48 Okla 566, 149 P 1105; *Riverside Portland Cement Co. v Mason*, 69 Or 502, 139 P 723; *Fink v Higgins Gas & Oil Co.*, 203 Va 86, 122 SE2d 539.

Forms: Notice of motion—To set aside submission and reopen case—Newly discovered evidence. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 76.

Affidavit—Of attorney—In support of motion to set aside submission and reopen case—Newly discovered evidence. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 77.

68. *Rucker v Wyandotte Sav. Bank*, 6 Mich App 195, 148 NW2d 532; *Seaboard Container Corp. v Rothschild*, 359 Pa 51, 58 A2d 800; *Bertha Zinc Co. v Martin's Adm'r*, 93 Va 791, 22 SE 869.

69. *Philadelphia & T.R. Co. v Stimpson*, 39 US 448, 10 L Ed 535; *State v Favors*, 92 Ariz 147, 375 P2d 260; *Ricker v Mathews*, 94 NH 313, 53 A2d 196, 171 ALR 296; *Perkiomen v Mest*, 513 Pa 598, 522 A2d 516 (apparent fraud perpetrated on court justified allowing recanted testimony); *Fink v Higgins Gas & Oil Co.*, 203 Va 86, 122 SE2d 539.

70. *United States Dept. of Housing & Urban Dev. v Anderson* (1st Dist) 178 Ill App 3d 752,

127 Ill Dec 837, 533 NE2d 919; *Kaluzny Bros., Inc. v Mahoney Grease Service, Inc.* (3d Dist) 165 Ill App 3d 390, 116 Ill Dec 289, 518 NE2d 1269, app den 121 Ill 2d 571, 122 Ill Dec 438, 526 NE2d 831; *Re Marriage of Suarez* (2d Dist) 148 Ill App 3d 849, 102 Ill Dec 85, 499 NE2d 642; *Department of Human Services v Thi-beault (Me)* 561 A2d 486; *Montpetit v Commissioner of Public Safety (Minn App)* 392 NW2d 663; *Kennedy v Peninsula Hospital Center* (2d Dept) 135 App Div 2d 788, 522 NYS2d 671.

As to the court's discretion with respect to reopening for material evidence inadvertently omitted, see § 383; as to inadvertently omitted evidence admissible without surprise or prejudice after the case in chief, see § 387.

71. *United States Dept. of Housing & Urban Dev. v Anderson* (1st Dist) 178 Ill App 3d 752, 127 Ill Dec 837, 533 NE2d 919; *Kaluzny Bros., Inc. v Mahoney Grease Service, Inc.* (3d Dist) 165 Ill App 3d 390, 116 Ill Dec 289, 518 NE2d 1269, app den 121 Ill 2d 571, 122 Ill Dec 438, 526 NE2d 831.

The trial court did not abuse its discretion by denying former law partners' motion to reopen the trial where the failure to introduce evidence on the issue was neither inadvertent nor excusable, but was the product of a knowing and informed choice of trial tactics. *Rosenfeld, Meyer & Susman v Cohen* (2nd Dist) 191 Cal App 3d 1035, 237 Cal Rptr 14.

Where an attorney, aware of the risk, proceeded to conduct a cross-examination into matters to which he was a witness and such was known to the attorney at the time he undertook his examination, by proceeding to conduct such cross examination, he accepted the risk that the witness might allude to his counsel's statement in his response; thus, where counsel did not request permission to take the stand until after the close of all the testimony, having delayed his request to testify until after the close of the evidentiary hearing, he could not subsequently complain that the court erred by

evidence.⁷³

- The diligence of the party in seeking the new evidence.⁷⁴
- The admissibility⁷⁵ and materiality of the new evidence to the proponent's case.⁷⁶
- The time or stage of the proceedings at which the motion is made.⁷⁷
- The time and effort expended upon the trial.⁷⁸
- Any cogent reasons which justify denying the request.⁷⁹

§ 383. Materiality of proffered evidence

The materiality of the evidence sought to be introduced on a motion to reopen is a factor considered in the court's determination whether to allow or deny the motion.⁸⁰ When there is no inconvenience to the court or unfair advantage to one of the parties, it is an abuse of discretion to refuse to reopen the case and permit the introduction of material evidence which would substantially affect the merits of the action and perhaps alter the court's decision.⁸¹ If a trial court feels that, by inadvertence or mistake, there has been

refusing to reopen the testimony for such purpose in view of the extensive cross-examination that would presumably have been undertaken by opposing counsel. *Upthegrove Hardware, Inc. v Pennsylvania Lumbermans Mut. Ins. Co.*, 146 Wis 2d 470, 431 NW2d 689, later app (App) 152 Wis 2d 7, 447 NW2d 367.

72. *Silber v Cn'R Industries of Jacksonville, Inc.* (Fla App D1) 526 So 2d 974, 13 FLW 1281 (additional evidence would have made the record reflect the true state of the facts as they existed when the plaintiff rested); *Turner v Lone Star Industries, Inc.* (Tex App Houston (1st Dist)) 733 SW2d 242.

73. *People v Rodriguez* (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433; *Buckingham v Buckingham* (FLA app D1) 492 So 2d 858, 11 FLW 1433; *United States Dept. of Housing & Urban Dev. v Anderson* (1st Dist) 178 Ill App 3d 752, 127 Ill Dec 837, 533 NE2d 919; *Kaluzny Bros., Inc. v Mahoney Grease Service, Inc.* (3d Dist) 165 Ill App 3d 390, 116 Ill Dec 289, 518 NE2d 1269, app den 121 Ill 2d 571, 122 Ill Dec 438, 526 NE2d 831; *Re Marriage of Suarez* (2d Dist) 148 Ill App 3d 849, 102 Ill Dec 85, 499 NE2d 642; *Department of Human Services v Thibeault* (Me) 561 A2d 486; *Stark v Circle K Corp.*, 230 Mont 468, 751 P2d 162, 3 BNA IER Cas 53; *Kennedy v Peninsula Hospital-Center* (2d Dept) 135 App Div 2d 788, 522 NYS2d 671.

The trial court's discretion whether to reopen a case for the introduction of additional evidence is not unlimited, and it may allow reopening only where this can be done without injustice to the other party. *Silber v Cn'R Industries of Jacksonville, Inc.* (Fla App 'D1) 526 So 2d 974, 13 FLW 1281.

As to unfairness and surprise where a motion to reopen is made after the close of the plaintiff's case in chief, see § 387.

74. § 385.

75. § 384.

76. § 383.

77. §§ 386 et seq.

78. *Kennedy v Peninsula Hospital Center* (2d Dept) 135 App Div 2d 788, 522 NYS2d 671.

79. *United States Dept. of Housing & Urban Dev. v Anderson* (1st Dist) 178 Ill App 3d 752, 127 Ill Dec 837, 533 NE2d 919; *Kaluzny Bros., Inc. v Mahoney Grease Service, Inc.* (3d Dist) 165 Ill App 3d 390, 116 Ill Dec 289, 518 NE2d 1269, app den 121 Ill 2d 571, 122 Ill Dec 438, 526 NE2d 831; *Re Marriage of Suarez* (2d Dist) 148 Ill App 3d 849, 102 Ill Dec 85, 499 NE2d 642.

80. *People v Rodriguez* (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433; *United States Dept. of Housing & Urban Dev. v Anderson* (1st Dist) 178 Ill App 3d 752, 127 Ill Dec 837, 533 NE2d 919; *Kaluzny Bros., Inc. v Mahoney Grease Service, Inc.* (3d Dist) 165 Ill App 3d 390, 116 Ill Dec 289, 518 NE2d 1269, app den 121 Ill 2d 571, 122 Ill Dec 438, 526 NE2d 831; *Di Matteo v County of Dona Ana* (App) 104 NM 599, 725 P2d 575, later proceeding (App) 109 NM 374, 785 P2d 285.

The trial court properly denied the appellant's motion to reopen the case, after both parties had rested in an action by a bank to recover damages for losses resulting from the dishonor of a check, where the appellant wished to call a witness to rebut his codefendant's testimony where the proffered testimony was relatively insignificant. *Security State Bank v Dieltz* (Minn App) 408 NW2d 186.

81. *Re Estate of Mapes* (Mo) 738 SW2d 853, later app (Mo App) 789 SW2d 44.

a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced at any time before the case has been decided.⁸² However, where the record does not indicate that there is additional evidence crucial to the case, that was not available at the trial date, there is no necessity for the court to hold the case open.⁸³

Trial courts are not encouraged to reopen a case to permit a party to change existing facts and thereby create an enforceable action where none existed prior to such change.⁸⁴

§ 384. Admissibility of proffered evidence

Irrespective of its weight, probative value, cumulative character, or the issue upon which it is offered, if the evidence sought to be offered on a motion to reopen is admissible and offered before the reading of the charge and prior to argument, it is reversible error to refuse the request to reopen for its receipt, unless it appears that its introduction would impede the trial or interfere with the due and orderly administration of justice.⁸⁵ On the other hand, it is never an error for the trial court to refuse to reopen for inadmissible evidence.⁸⁶

Ordinarily, when a case is opened for the purpose of permitting evidence to be admitted as to a particular point, the court is not obliged to open the case generally for the introduction of any evidence which may be offered.⁸⁷ However, where the plaintiff failed in some respect to prove a cause of action and on that account the defendant offered no evidence in his defense, if the plaintiff is permitted to reopen the case and supply the defect, the defendant should then be permitted to put in his defense, and a refusal to permit him to do so is an abuse of discretion, for until the plaintiff had made out a prima

82. *Luciani v Stop & Shop Cos.*, 15 Conn App 407, 544 A2d 1238, app den 209 Conn 809, 548 A2d 437.

At the sentencing hearing after a court trial in which defendant was found guilty of child molestation, the court did not abuse its discretion in allowing the prosecution to reopen its case to introduce certified documents from the Department of Corrections proving the two prior convictions for child molestation charged in the information, where the specific question of the proof of the priors had been an issue in the case, and none of the evidence introduced was disputed; although the prosecution should have diligently obtained and introduced the proof of the priors at the earliest possible time, the significance of the proof compelled an order to reopen the case and admit the evidence. *People v Rodriguez* (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433.

83. *Bricks Unlimited, Inc. v Stepter* (La App 4th Cir) 538 So 2d 1147.

84. *Silber v Cn'R Industries of Jacksonville, Inc.* (Fla App D1) 526 So 2d 974, 13 FLW 1281.

It was not an abuse of discretion for the trial court, in an action for divorce, to deny the wife's request to reopen her case to seek attorneys' fees, where there was no evidence presented as to the value of the legal services in the case before the wife rested. *Underwood v Underwood* (Ala App) 491 So 2d 242.

A remand by the trial court, in equity, for evidence on a different theory than that expressed in the bill of complaint is proper where the parties are appraised of the theory by the court in ample time to meet the issue. *Hamilton v McGill* (Miss) 352 So 2d 825.

85. *Vital v State* (Tex Crim) 523 SW2d 662.

See, however, *Re Krilich's Estate*, 122 Wash 306, 210 P 788, mod 122 Wash 312, 215 P 9, holding that it is not an abuse of discretion to refuse to open a case for further testimony, when such testimony tends only to affect the credibility of witnesses.

86. *Tucker v State* (Tex Crim) 578 SW2d 409.

87. *Bridger v Exchange Bank*, 126 Ga 821, 56 SE 97.

facie cause the defendant was not guilty of negligence in not offering his evidence to sustain his defense.⁸⁸

§ 385. Showing of due diligence

The party moving to reopen a case must show diligence in producing the evidence at trial before the evidence is closed,⁸⁹ except where the evidence proffered addresses a specific issue in the case, none of the evidence introduced is disputed, and the significance of the proof compels reopening to admit the evidence.⁹⁰ Mere inadvertence is not sufficient to require reopening.⁹¹

The important factor with respect to diligence when leave to reopen is sought is not whether the evidence was available or could have been secured at an earlier stage of the trial, but rather whether it is available at the time the request to reopen is made.⁹²

Even in a criminal case, where the defendant fails to exercise due diligence to obtain the testimony of a witness, the court may properly refuse to permit reopening of the case for that testimony.⁹³

In some jurisdictions, the trial judge is required by statute to determine whether the party seeking to reopen the evidence has exercised due diligence.⁹⁴

88. *Pavlis v Atlas-Imperial Diesel Engine Co.*, 121 Fla 185, 163 So 515; *Riverside Portland Cement Co. v Masson*, 69 Or 502, 139 P 723.

89. *People v Rodriguez* (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433; *Security State Bank v Dieltz* (Minn App) 408 NW2d 186 (by implication); *Turner v Lone Star Industries, Inc.* (Tex App Houston (1st Dist)) 733 SW2d 242; *Fisher v Kerr County* (Tex App San Antonio) 739 SW2d 434 (where the defendant waited almost 7 months after trial and until the court rendered its decision to move to reopen, such does not indicate diligence).

Where the movant made no showing that evidence he sought to introduce on a motion to reopen was unavailable at the time of the trial, nor offered any excuse for not presenting the evidence at that time, the trial court could properly deny the motion and was under no duty to reopen the case for the introduction of additional testimony. *Greater Peoria Sanitary & Sewage Disposal Dist. v Hermann* (3d Dist) 153 Ill App 3d 398, 106 Ill Dec 222, 505 NE2d 769.

The trial court properly denied plaintiff's attempt to introduce medical bills as a motion to reopen the evidence, where plaintiff's counsel never demonstrated that the additional bills could not have been presented at the time of the trial. *Di Matteo v County of Dona Ana* (App) 104 NM 599, 725 P2d 575, later proceeding (App) 109 NM 374, 785 P2d 285.

As to the showing of due diligence to reopen the record in a federal court action under

Federal Rules of Civil Procedure 59 and 60(b) (2), see 25 Federal Procedure, L Ed, New Trial § 58:19.

90. *People v Rodriguez* (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433 (proof of prior convictions admissible on reopening at sentencing hearing).

91. *Montpetit v Commissioner of Public Safety* (Minn App) 392 NW2d 663.

Where evidence of diminution in value of the defendant's house was essential to his case, and he did not present any evidence during the case in chief as to the diminution of value despite a full and fair opportunity to present his case, the court did not abuse its discretion in not allowing him to reopen his examination after being alerted to his omissions. *Gerrety Co. v Palmieri*, 11 Conn App 226, 526 A2d 555.

92. *Scott v State* (Tex Crim) 597 SW2d 755; *Vital v State* (Tex Crim) 523 SW2d 662.

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93. *People v Boyce* (1st Dist) 51 Ill App 3d 549, 9 Ill Dec 403, 366 NE2d 914.

94. *Turner v Lone Star Industries, Inc.* (Tex App Houston (1st Dist)) 733 SW2d 242.

(3) TIME OF MOTION TO REOPEN EVIDENCE [§§ 386-394]

§ 386. Generally

The stage the proceedings have reached when a motion to reopen is made is a factor in the court's determination to grant or deny the motion.⁹⁵ A trial court is not justified in closing the case until all the evidence, offered in good faith and necessary to the ends of justice, has been heard.⁹⁶ If a trial court feels that there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced at any time before the case has been decided,⁹⁷ and in some cases, even after verdict and judgment.⁹⁸

■■■■ Reminder: The opportunity to reopen is not intended to permit counsel to introduce startling and persuasive evidence out of order at the very end of the case, particularly where opposing counsel is surprised and is without time to react.⁹⁹

No rigid or fixed formula can or should be employed to determine when a motion to reopen is proper since the trial court, which has a feel for the case, can best determine what is necessary and appropriate to achieve substantial justice.¹ Thus, the trial court has broad discretion to allow a party to reopen its case and to present additional evidence, whether it does so after a party rests, after the close of all the evidence, or even after having directed a verdict for one party, and such ruling by the trial court, absent a showing of abuse of discretion, will not be overturned on appellate review.² But, the reopening of a case for the purpose of introducing overlooked evidence may be denied because of the absence of a showing to excuse the untimeliness of the offer.³

■■■■ Observation: A party seeking to reopen the evidence in a federal court action should file a motion within the deadline for a motion for a new trial or for relief from judgment.⁴

§ 387. After close of evidence in chief

Whether a party should be allowed to reopen his case after resting is a matter within the discretion of the trial court, and absent a clear abuse of

95. *People v Rodriguez* (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433.

96. *State v Favors*, 92 Ariz 147, 375 P2d 260; *Fink v Higgins Gas & Oil Co.*, 203 Va 86, 122 SE2d 539.

97. § 383.

98. § 394.

99. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 14:13.

1. *Stark v Circle K Corp.*, 230 Mont 468, 751 P2d 162, 3 BNA IER Cas 53.

2. *Silber v Cn'R Industries of Jacksonville*,

Inc. (Fla App D1) 526 So 2d 974, 13 FLW 1281.

As to motions to reopen at various times in and after the trial, see §§ 387 et seq.

3. *Eason v United States* (CA9 Cal) 281 F2d 818, 87 ALR2d 842.

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4. § 381.

discretion, the court's decision to reopen the case will not be reversed on appeal.⁵

A trial court is not justified in closing the case until all the evidence, offered in good faith and necessary to the ends of justice, has been heard,⁶ particularly where the plaintiff seeks to reopen before the defense has presented any evidence⁷ and where no surprise or prejudice would result therefrom.⁸ Thus, although a party should, in giving the evidence in chief, offer all evidence in support of the case,⁹ the discretion of the trial court may always be invoked, after a party has rested or after the close of the evidence by both parties, to allow reopening where this could be done without injustice to the other party,¹⁰ to supply defects in the evidence which have inadvertently occurred.¹¹

Although the trial court possesses discretion to reopen a case after the party has rested, such discretion should be sparingly exercised.¹² And, while it may be appropriate to reopen a case to enable a party to present additional evidence prior to the presentation of the opponent's evidence, an untimely motion to reopen should be denied, especially when such a motion is made after the court rules on the relevant issue, the proponent fails to disclose the nature of the omitted evidence, and the evidence sought to be introduced is not newly discovered.¹³

5. *Underwood v Underwood* (Ala App) 491 So 2d 242; *Gerrety Co. v Palmieri*, 11 Conn App 226, 526 A2d 555; *Sports Page, Inc. v First Union Management, Inc.* (Minn App) 438 NW2d 428; *Corman v Musselman*, 232 Neb 159, 439 NW2d 781; *State v Vejvoda*, 231 Neb 668, 438 NW2d 461.

6. § 379.

7. *State v Revelle*, 301 NC 153, 270 SE2d 476 (diverged from by *State v White*, 322 NC 506, 369 SE2d 813) (no surprise or prejudice in reopening to admit a stipulation); *State v Gleason*, 24 NC App 732, 212 SE2d 213.

A plaintiff's motion to reopen and present additional proof, made immediately after he has rested and before any offer of proof by the defendant, should be granted in the absence of a showing of prejudice to the defendant. *Salzman v Alan S. Rosell, D.D.S., P.C.* (3d Dept) 129 App Div 2d 833, 513 NYS2d 846.

8. *People v Ceja* (5th Dist) 205 Cal App 3d 1296, 253 Cal Rptr 132, review den; *State v Revelle*, 301 NC 153, 270 SE2d 476 (diverged from by *State v White*, 322 NC 506, 369 SE2d 813) (no surprise or prejudice in reopening to admit a stipulation).

Where the prosecution rested at the close of the second day of trial and immediately at the beginning of the trial on the following day requested permission to reopen, and the defendant had not yet presented any evidence and had ample opportunity to cross-examine the prosecution's witness, therefore no prejudice resulted. *United States v Cephas* (ED Pa) 372 F Supp 1225, aff'd without op (CA3 Pa) 500 F2d 1400.

9. § 358.

10. *Payne v Jones & Kolb*, 190 Ga App 62, 378 SE2d 467; *Buckingham v Buckingham* (Fla App D1) 492 So2d 858, 11 FLW 1433; *Lagana v French* (2d Dept) 145 App Div 2d 541, 536 NYS2d 95.

A party must ask for permission of the court to reopen his case to introduce further evidence on his case in chief. *Iota Management Corp. v Boulevard Invest. Co.* (Mo App) 731 SW2d 399.

11. *Cummings v Wafer* (La App 2d Cir) 499 So 2d 184; *Corman v Musselman*, 232 Neb 159, 439 NW2d 781; *Kennedy v Peninsula Hospital Center* (2d Dept) 135 App Div 2d 788, 522 NYS2d 671.

See, however, *Montpetit v Commissioner of Public Safety* (Minn App) 392 NW2d 663, holding that mere inadvertence is not sufficient to require reopening.

12. *Shapiro v Shapiro* (2d Dept) 151 App Div 2d 559, 542 NYS2d 339.

13. *Shapiro v Shapiro* (2d Dept) 151 App Div 2d 559, 542 NYS2d 339.

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■■■■ Observation: In a bench trial, the judge may grant permission to reopen the evidence, so long as the opposing party has a chance to rebut the new evidence. In such trials, a “new trial” usually consists of reopening the record to hear additional evidence and even new arguments not previously before the court.¹⁴

§ 388. —Effect of continuance

■■■■ Practice guide: Instead of going through the expense and inconvenience of a new trial, a motion for a continuance allows the current jury and record of the case to be used for part of a day, days, or, in extreme situations, weeks or months, though long continuances are rarely granted since postponing resolution will cause the evidence to fade in the minds of the jurors.¹⁵

In deciding whether to grant a continuance or leave to reopen to hear certain evidence, the court must exercise its judgment not only as to the admissibility of the proffered evidence in conventional terms, but also as to whether the circumstances warrant continuance or reopening.¹⁶ Even where a case tried before the court has been continued to the next term after the evidence has been closed, the court has been held entitled to receive evidence at the next term to supply a deficiency.¹⁷

■■■■ Recommendation: Where evidence which may prejudice the party against whom it is offered is admitted at any time in the proceedings of a cause, particularly a criminal prosecution, a continuance should be sought, in addition to lodging an objection, for the submission of rebuttal.¹⁸

§ 389. After motion for dismissal, nonsuit, or directed verdict; demurrer

It is common practice for the trial court to allow the case to be reopened and additional evidence introduced in order to prevent—

—a dismissal,¹⁹ where there is no inadvertence, forgetfulness, lack of preparation, or bad faith exhibited by either party,²⁰ or prejudice to the opposing party;²¹

14. **Practice References:** Danner & Toothman, Trial Practice Checklists (1989), § 8:250.

15. **Practice References:** Danner & Toothman, Trial Practice Checklists (1989), § 8:250.

16. *People v Boyce* (1st Dist) 51 Ill App 3d 549, 9 Ill Dec 403, 366 NE2d 914.

As to grounds for continuance in civil and criminal trials, generally, see 17 Am Jur 2d, Continuance §§ 5 et seq.

Practice References: Motion for continuance in state courts. Bailey & Rothblatt, Investigation and Preparation of Criminal Cases 2d ed, 1985), § 15:35.

17. *Tollett v Knod*, 210 Ark 781, 197 SW2d 744; *Gross v Watts*, 206 Mo 373, 104 SW 30.

18. *People v Rodriguez* (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433 (although defendant objected to admission of the certified documents of prior convictions at a sentencing hearing, he failed to seek a continuance to prepare rebuttal evidence).

19. *Lagana v French* (2d Dept) 145 App Div 2d 541, 536 NYS2d 95; *Salzman v Alan S. Rosell, D.D.S., P.C.* (3d Dept) 129 App Div 2d 833, 513 NYS2d 846; *State v Revelle*, 301 NC 153, 270 SE2d 476 (diverged from by *State v White*, 322 NC 506, 369 SE2d 813) (reopening allowed to enter evidence stipulated to by parties).

For discussion of taking the case from the jury, including nonsuit, direction of verdict, and demurrer to evidence, see §§ 842 et seq.

As to termination of action by dismissal or nonsuit as limited to certain stage of action or proceedings, see 24 Am Jur 2d, Dismissal, Discontinuance, and Nonsuit, §§ 19 et seq.

20. *Sports Page, Inc. v First Union Management, Inc.* (Minn App) 438 NW2d 428.

21. *Sports Page, Inc. v First Union Management, Inc.* (Minn App) 438 NW2d 428 (no prejudicial delay); *Lagana v French* (2d Dept) 145 App Div 2d 541, 536 NYS2d 95; *Salzman v*

- a nonsuit, where counsel for the plaintiff has omitted evidence by accident, inadvertence, or even because of a mistake as to the necessity for offering a particular witness or particular evidence;²²
- a directed verdict,²³ or where the opposing party failed to object to the offer of additional testimony to withstand the motion.²⁴

A case may be reopened for additional evidence even after a verdict has been directed,²⁵ and where a demurrer to the evidence has been interposed.²⁶

The reopening of the evidence after a motion for nonsuit, dismissal, or directed verdict is not a matter of arbitrary right on the part of the plaintiff or counsel, since the judge has considerable discretion in the matter,²⁷ particularly where a statute specifically provides that the trial judge may exercise his discretion to permit any party to introduce additional evidence at any time prior to verdict.²⁸

§ 390. During argument

Although a party has no legal right to submit further testimony after the argument has commenced,²⁹ the trial court may in its discretion permit the case to be reopened and further evidence admitted after argument has commenced, and its action in so doing ordinarily will not be interfered with.³⁰

Alan S. Rosell, D.D.S., P.C. (3d Dept) 129 App Div 2d 833, 513 NYS2d 846.

22. *Mapes v Madison County*, 252 Iowa 395, 107 NW2d 62, 91 ALR2d 984; *State v Burbank*, 156 Me 269, 163 A2d 639, 95 ALR2d 166; *Seaboard Container Corp. v Rothschild*, 359 Pa 51, 58 A2d 800.

23. *T.H. Properties v Sunshine Auto Rental, Inc. (App)* 151 Ariz 444, 728 P2d 663; *Bridger v Exchange Bank*, 126 Ga 821, 56 SE 97; *State v Anderson*, 209 Iowa 510, 228 NW 353, 67 ALR 1366; *Boone v Citizen's Bank & Trust Co.*, 154 Tenn 241, 290 SW 39, 50 ALR 1369; *MCI Telecommunications Corp. v Tarrant County Appraisal Dist. (Tex App Fort Worth)* 723 SW2d 350; *State v Constatine*, 43 Wash 102, 86 P 384.

The trial court, after the plaintiff had rested its case in an action by a contractor against a homeowner to recover under a home construction contract without putting on any evidence of the cost of remedying the defects in the house, properly denied the defendants' motion for directed verdict and permitted the plaintiff to put on, over objection, rebuttal testimony in evidence of the cost of repairing the defects, because a directed verdict may be granted only after all the evidence has been heard, the new "rebuttal" evidence provided the missing element for the plaintiff's substantial performance cause. *Uhlir v Golden Triangle Dev. Corp. (Tex App Fort Worth)* 763 SW2d 512.

24. *MCI Telecommunications Corp. v Tarrant County Appraisal Dist. (Tex App Fort Worth)* 723 SW2d 350.

25. *Pavlis v Atlas-Imperial Diesel Engine Co.*, 121 Fla 185, 163 So 515.

When the trial judge reversed his original directed verdict on the issue of respondeat superior, it was an abuse of discretion to refuse to allow the defendants to present additional testimony on that issue; a party cannot be penalized for good-faith reliance on a trial court's ruling, and where a ruling is subsequently found to be erroneous, litigants must be granted an opportunity to present their case under the corrected ruling. *John Hancock Mut. Life Ins. Co. v Zalay (Fla App D2)* 522 So 2d 944, 13 FLW 733, review den (Fla) 531 So 2d 169, later proceeding (Fla App D2) 16 FLW D782.

26. *Virginia R. & P. Co. v Gorsuch*, 120 Va 655, 91 SE 632.

27. *Eli Witt Cigar & Tobacco Co. v Matatics (Fla)* 55 So 2d 549; *Wickham v Torley*, 136 Ga 594, 71 SE 881; *Benfield v H.K. Porter Co. 1 Mich App* 543, 137 NW2d 273, dismd 377 Mich 696, 387 NW2d 912.

28. *State v Revelle*, 301 NC 153, 270 SE2d 476 (diverged from by *State v White*, 322 NC 506, 369 SE2d 813).

29. *Greene v Rhode Island Co.*, 38 RI 17, 94 A 869; *Finch v Grays Harbor County*, 121 Wash 486, 209 P 833, 24 ALR 644; *Hecht v Acme Coal Co.*, 19 Wyo 18, 113 P 788, adhered to 19 Wyo 32, 117 P 132.

30. *Greene v Rhode Island Co.*, 38 RI 17, 94 A 869; *Finch v Grays Harbor County*, 121 Wash 486, 209 P 833, 24 ALR 644; *Hecht v Acme Coal Co.*, 19 Wyo 18, 113 P 788, adhered to 19 Wyo 32, 117 P 132.

It is proper to allow the introduction of testimony at any time before the argument of a cause is concluded, if it appears that it is necessary to the due administration of justice,³¹ such as where the evidence was omitted by inadvertence or because of a previous lack of knowledge by counsel.³²

§ 391. After argument

The trial judge may in his discretion reopen the case for the reception of additional evidence after the conclusion of the argument of counsel to the jury,³³ particularly where the opponent neither objects to nor contradicts the evidence.³⁴

Even where the order of trial in criminal cases is fixed by statute, the common-law power of the trial court to alter the order of proof in its discretion and in the furtherance of justice remains at least up to the time the case is submitted to the jury.³⁵ If the evidence is admissible, irrespective of its weight, probative value, or cumulative character, and if it is offered before the charge to the jury is read, it is reversible error to refuse the request to reopen for its receipt, unless it appears that its introduction would have impeded the trial or interfered with the due and orderly administration of justice.³⁶

§ 392. After submission of case to jury

The trial judge may in his discretion reopen the case for the reception of additional evidence after the submission of the case to the jury,³⁷ as where such action remedies a mistake of the court,³⁸ and in a criminal prosecution

31. *Department of Human Services v Thi-beault (Me)* 561 A2d 486; *Vital v State (Tex Crim)* 523 SW2d 662.

In a prosecution for aggravated robbery, the trial court abused its discretion in refusing to reopen the case after both sides had closed so that defendant could offer an alibi witness where the witness was timely presented in court and was ready to testify before the argument of the case was concluded and where the motion to reopen specifically stated what testimony the witness was expected to give and the importance it carried. *Scott v State (Tex Crim)* 597 SW2d 755.

32. *Department of Human Services v Thi-beault (Me)* 561 A2d 486.

33. *People v Lewis*, 124 Cal 551, 57 P 470; *American Bank & Trust Co. v McDowell (La App 2d Cir)* 545 So 2d 1211; *St. Louis S.F.R. Co. v Clark*, 104 Okla 24, 229 P 779.

34. *American Bank & Trust Co. v McDowell (La App 2d Cir)* 545 So 2d 1211 (opponent moved for rebuttal).

As to trial objections to the introduction of evidence, generally, see §§ 395 et seq.

35. *People v Olsen*, 34 NY2d 349, 357 NYS2d 487, 313 NE2d 782.

36. *Tucker v State (Tex Crim)* 578 SW2d 409.

37. *Eason v United States (CA9 Cal)* 281 F2d 818, 87 ALR2d 842; *Garner v State*, 97 Ark 63,

132 SW 1010; *People v Rodriguez (2nd Dist)* 152 Cal App 3d 289, 199 Cal Rptr 433; *Stark v Circle K Corp.*, 230 Mont 468, 751 P2d 162, 3 BNA IER Cas 53; *State v Foster*, 28 NM 273, 212 P 454; *People v Olsen*, 34 NY2d 349, 357 NYS2d 487, 313 NE2d 782; *People v Ferrone*, 204 NY 551, 98 NE 8; *State v Brown*, 1 NC App 145, 160 SE2d 508; *Miller v Hickman (Okla)* 359 P2d 172; *Bertha Zinc Co. v Martin's*, 93 Va 791, 22 SE 869.

Annotations: Propriety of reopening criminal case in order to present omitted or overlooked evidence, after submission to jury but before return of verdict, 87 ALR2d 849 § 2.

38. *Turner v Lone Star Industries, Inc. (Tex App Houston (1st Dist))* 733 SW2d 242 (court properly reopened the evidence while the jury was deliberating to admit an invoice lacking from the evidence due to the court's mistake).

It was an abuse of discretion for the trial court in an action by a subway passenger to recover for injuries resulting from a fall after a sudden stop, to deny the defendants' motion to reopen made after the jury charge, to introduce maintenance records of the defendant subway, where the records were simple to read and were reviewed by defense counsel in approximately 1 hour, they showed that proper maintenance was made on every car for at least a year prior to the accident and that no prior occurrences of unexplained short violent stops occurred, particularly where the trial court er-

where an essential element has been overlooked or newly discovered evidence bears directly on the question of the defendant's guilt or innocence.³⁹ Under this rule the trial court has the power to recall the jury after it has retired to consider its verdict, and to reopen the case and receive evidence which is of vital importance to the accused.⁴⁰ So long as the defendant has an opportunity to offer evidence in rebuttal, the court has discretion to reopen a case for additional testimony up until the jury returns.⁴¹ However, there is some authority to the effect that in a criminal case the court cannot reopen the case and permit the introduction of omitted or overlooked evidence after the case has been submitted to the jury.⁴²

In no case should the trial court reopen the proof to admit evidence after the jury has retired where the possibility of seriously disrupting the trial process or unduly prejudicing one of the parties in so doing appears.⁴³

§ 393. —Abuse of discretion

The exercise of discretion in reopening a case for additional evidence after its submission to the jury will not be overturned on appeal except in a clear case of abuse.⁴⁴

Where a request to reopen for the introduction of evidence is first made after the jury charge is read, a more serious question of interference with the due and orderly administration of justice is raised than is presented in the situation where the motion to reopen is made before the conclusion of argument.⁴⁵ Because the courts are usually reluctant to go so far, the situation in which a reopening should be allowed after submission of the case must be one of extreme hardship to the proponent⁴⁶ or extraordinary circumstances.⁴⁷

erroneously instructed the jury that the mere happening of an accident did not give rise to a presumption of negligence and that the defendant had the burden of proving that the train was properly maintained. *Veal v New York City Transit Authority* (2d Dept) 148 App Div 2d 443, 538 NYS2d 594.

Practice References: Setting aside submission and reopening case—Newly discovered evidence. 23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 76-78.

39. *People v Olsen*, 34 NY2d 349, 357 NYS2d 487, 313 NE2d 782.

Trial court did not abuse its discretion in refusing defendant permission to introduce testimony of witness who did not arrive in courtroom until after jury had begun its deliberations where, after defendant's request was made, court conducted voir dire to determine importance of the witness' testimony. *State v Turner*, 21 NC App 608, 205 SE2d 628, cert den and app dismd 285 NC 668, 207 SE2d 751.

40. *State v Wolf*, 44 NJ 176, 207 A2d 670; *State v Foster*, 28 NM 273, 212 P 454.

41. *State v Perry*, 23 NC App 190, 208 SE2d 427, app dismd 286 NC 341, 210 SE2d 60.

As to the court's discretion respecting the time and order of rebuttal, see § 369.

42. *Beeler v State* (Tex Crim) 374 SW2d 237, cert den 379 US 847, 13 L Ed 2d 51, 85 S Ct 88.

Annotations: Propriety of reopening criminal case in order to present omitted or overlooked evidence, after submission to jury but before return of verdict, 87 ALR2d 849 § 3.

43. *People v Olsen*, 34 NY2d 349, 357 NYS2d 487, 313 NE2d 782.

44. *Denman v Brennamen*, 48 Okla 566, 149 P 1105.

45. *Scott v State* (Tex Crim) 597 SW2d 755.

46. *Stipp v Claman*, 123 Ind 532, 24 NE 131.

Trial court abused its discretion in permitting district attorney to recall prosecution witness for purpose of giving additional testimony after case had been submitted to jury where additional proof was not admitted at jury's request, did not supply an element of state's case which had been overlooked, was not newly-discovered evidence, and did not relate directly to defendant's guilt, but was rather directed primarily to a credibility problem. *People v Olsen*, 34 NY2d 349, 357 NYS2d 487, 313 NE2d 782.

Apart from the merits of a predictable trial pattern, new evidence introduced during the jury's deliberations is likely to give undue emphasis with consequent distortion of the evidence as a whole, giving rise to the real possibility of prejudice to the party against whom the evidence is offered.⁴⁸

§ 394. After verdict and judgment

The trial court may in the exercise of discretion permit the evidence in a case to be reopened even, in some circumstances, after verdict and judgment,⁴⁹ even at a sentencing hearing.⁵⁰ However, if evidence offered for the first time in a posttrial motion to reopen would not affect the court's final decision,⁵¹ or could have been produced at an earlier time, it is not an abuse of discretion for the court to deny its introduction into evidence.⁵²

C. OBJECTIONS [§§ 395-460]

Research References

ALR Digest to 3d, 4th, and Federal, Appeal and Error §§ 352, 359, 360, 369-371, 376; Criminal Law §§ 100, 111.8, 127, 128.7; Trial §§ 10, 12, 25

Index to Annotations, Appeal and Error; Evidence; Trial; Witnesses

23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 71, 73, 74, 127

5 Am Jur Trials 611, Presenting Plaintiff's Case §§ 41-46; 6 Am Jur Trials 605, Making and Preserving the Record—Objections § 12

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:816-22:818; 12 Federal Procedure, L Ed, Evidence §§ 33:20-33:24

Carlson, Successful Techniques for Civil Trial (1983) §§ 2:2, 2:28, 2:29, 2:33

Danner & Toothman, Trial Practice Checklists (1989) § 8:170

Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) §§ 19:2-19:4

47. *Bertha Zinc Co. v Martin's*, 93 Va 791, 22 SE 869; (evidence of expert witness).

48. *People v Olsen*, 34 NY2d 349, 357 NYS2d 487, 313 NE2d 782 (where a case is reopened after the jury has retired to submit additional evidence on a credibility issue, there is an enhanced possibility of distorting the evidence and disrupting the trial).

49. *Mattfeld v Nester*, 226 Minn 106, 32 NW2d 291, 3 ALR2d 909 (superseded by statute as stated in *Bonhiver v Fugelso*, Porter, Simich & Whiteman, Inc. (Minn) 355 NW2d 138) (the trial court has the power, even after verdict and judgment, to reopen a case to receive proof of an incontrovertible document, omitted through inadvertence or mistake); *Riverside Portland Cement Co. v Masson*, 69 Or 502, 139 P 723.

The trial court did not improvidently exercise its discretion in denying a defense motion to reopen the trial for additional evidence in support of his claims for ancillary relief, where the defendant removed to reopen the case

approximately 5 months after the close of all the evidence and approximately 3½ months after the trial court issued its memorandum decision. *Shapiro v Shapiro* (2d Dept) 151 App Div 2d 559, 542 NYS2d 339.

For discussion of reopening the record for new evidence in a motion for a new trial, see 58 Am Jur 2d, New Trial §§ 480, 489, 506.

50. *People v Rodriguez* (2nd Dist) 152 Cal App 3d 289, 199 Cal Rptr 433 (where the evidence proffered addresses a specific issue in the case, none of the evidence introduced is disputed, and the significance of the proof compels reopening to admit the evidence).

51. *Tucek v Huff* (App) 115 Idaho 905, 771 P2d 923.

52. *Tucek v Huff* (App) 115 Idaho 905, 771 P2d 923; *Re Marriage of Collins* (2d Dist) 154 Ill App 3d 655, 107 Ill Dec 109, 506 NE2d 1000; *Parker v Beacon Hill Architectural Com.*, 27 Mass App 211, 536 NE2d 1108, review den 405 Mass 1202, 541 NE2d 344 (5 months after close of trial).

1. PURPOSE AND USE OF OBJECTIONS [§§ 395-400]

§ 395. Basis for remedial action and appellate review

The fundamental purpose of an objection to evidence is to bring to the court's attention potentially inadmissible evidence so that the court may make a ruling on the question,⁵³ on the grounds stated,⁵⁴ as well as to give the trial court the opportunity to take appropriate preventive or corrective action.⁵⁵

The ordinary method of raising in the trial court and preserving for review questions which would not otherwise appear upon the record is to bring the matter to the attention of the trial court by means of an objection, and when the ruling is adverse, to take exception to the ruling or other action of the court. The objection lays the foundation for the exception,⁵⁶ warning both court and counsel that such adverse ruling may be the basis of appellate review.⁵⁷

Where a question asked by the court is objectionable, an objection lies and it is necessary to object so as to preserve the question for review, in the same manner as though counsel were examining the witness.⁵⁸

■■■■ Observation: In federal court, under the Federal Rules of Evidence, counsel is not relieved of the duty to make a timely objection merely because the trial court, instead of opposing counsel, asks the purportedly improper question.⁵⁹

53. *Rowe v State*, 120 Fla 649, 163 So 22; *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464; *Wimer v Hinkle* (W Va) 379 SE2d 383.

For discussion of the court's discretion respecting the reception of evidence, generally, see § 321.

As to rules of admissibility and the relevancy, materiality, and competency of evidence, see 29 Am Jur 2d, Evidence §§ 249 et seq.

Practice References: Purpose of objection. 6 Am Jur Trials 605, Making and Preserving the Record—Objections § 5.

54. *Moore v Clark* (La App 1st Cir) 517 So 2d 293.

As to the sufficiency of objections, generally, see § 424.

55. *Voorhees v Jackson*, 35 US 449, 9 L Ed 490; *Shannon v Shaffer Oil & Refining Co.* (CA10 Okla) 51 F2d 878, 78 ALR 851; *Malone v Melnick*, 378 Pa 483, 106 A2d 806, 48 ALR2d 1254; *Wimer v Hinkle* (W Va) 379 SE2d 383.

Defendant in a narcotics prosecution properly preserved his objection to evidence of his involvement in another drug investigation and a previous unrelated sale of narcotics, where defense counsel timely moved to strike or exclude evidence of any activity other than that charged in the information prior to the taking of testimony and where, although counsel moved unsuccessfully at the end of trial for a mistrial, the grounds while clumsily expressed

were sufficient to apprise the trial court of his alleged error in admitting evidence of these collateral crimes. *Malcolm v State* (Fla App D3) 415 So 2d 891.

Practice References: Avoiding objections. 5 Am Jur Trials 611, Presenting Plaintiff's Case §§ 41-46.

56. 5 Am Jur 2d, Appeal and Error §§ 553-558.

57. *United States v La Franca*, 282 US 568, 75 L Ed 551, 51 S Ct 278, 2 USTC ¶679, 9 AFTR 985; *American Distilling Co. v Wisconsin Liquor Co.* (CA7 Wis) 104 F2d 582, 123 ALR 739.

Practice References: Objections to rulings or orders in federal criminal cases. 9 Federal Procedure, L Ed, Criminal Procedure §§ 22:816-22:818.

Appeal of evidentiary rulings in federal court actions. 2 Federal Procedure, L Ed, Appeal, Certiorari, and Review §§ 1 et seq.

Forms: Exception to ruling. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 73.

58. *Brown v Caylor*, 144 Ga 302, 87 SE 295.

59. *United States v Vega* (CA2 NY) 589 F2d 1147, 3 Fed Rules Evid Serv 1267.

As to the necessity for a contemporaneous objection, generally, and in federal court, see § 401.

Practice References: 12 Federal Procedure, L Ed, Evidence § 33:22.

Objections to offered evidence are not evidence of the facts stated in the objection.⁶⁰

A demurrer ore tenus, on the ground that the complaint, declaration, or petition fails to state a cause of action, is an objection to the receipt of any evidence.⁶¹

§ 396. —Right to ruling

Fundamental principles of evidentiary procedure dictate that evidence must be offered before an opposing party may object to its introduction or before its admissibility may be ruled upon by a trial court judge.⁶² An objecting party has the right to a ruling, and if that right is not recognized, with the result that improper evidence is introduced to his prejudice, there is error.⁶³ No party can simultaneously offer and object to the same evidence.⁶⁴

■■■■ *Recommendation:* The objecting trial attorney is entitled to a ruling on the record regarding the objection. If the court is less than decisive in providing this, counsel should politely request a ruling.⁶⁵

An objection on the ground that the witness' answer is unresponsive to the question is properly available only to the party propounding the questions.⁶⁶ An attorney who is not conducting the examination may not have unresponsive testimony stricken unless it is incompetent.⁶⁷

Where several counsel represent the same party, any or all of them may interpose objections, even though a statute prohibits more than one attorney from examining a witness.⁶⁸

Amicus curiae may not object to evidence and except to the ruling for a party to the action.⁶⁹

§ 397. —Review of ruling

The rulings of trial courts on matters of admissibility of evidence are given

60. *State v Roland*, 336 Mo 563, 79 SW2d 1050, 102 ALR 601.

It is irregular to permit the defendant to interject into the plaintiff's case testimony upon the merits of the defense, in support of an objection that the plaintiff's evidence was irrelevant. *United States v Hunt*, 105 US 183, 26 L Ed 1037.

61. *Lease Northwest, Inc. v Davis*, 224 Neb 617, 400 NW2d 220.

For discussion of objection to the introduction of any evidence where the plaintiff's complaint fails to state a cause of action, see 61A Am Jur 2d, Pleading §§ 201, 203, 204.

62. *Roberts v Roberts*, 299 SC 315, 384 SE2d 719.

As to offers of proof, and the necessity therefor, see §§ 440 et seq.

63. *Madsen v Obermann*, 237 Iowa 461, 22 NW2d 350; *Haaren v Mould*, 144 Iowa 296, 122 NW 921.

64. *Steel Sales Corp. v Industrial Com.*, 293 Ill 435, 127 NE 698, 14 ALR 274; *Mandery v*

Chronicle Broadcasting Co., 228 Neb 391, 423 NW2d 115; *State ex rel. State of Washington, Dept. of Social & Health Services v Dilworth*, 89 Or App 158, 747 P2d 387, review den 305 Or 433, 753 P2d 1380; *Clark v Wild*, 85 Vt 212, 81 A 536.

65. § 439.

66. *Hester v Goldsburly* (1st Dist) 64 Ill App 2d 66, 212 NE2d 316; *State v Beam*, 45 NC App 82, 262 SE2d 350.

67. *Hester v Goldsburly* (1st Dist) 64 Ill App 2d 66, 212 NE2d 316.

As to grounds for a motion to strike evidence, see §§ 479 et seq.

For discussion of incompetent evidence, see 29 Am Jur 2d, Evidence §§ 257-263.

68. *State v Giudice*, 170 Iowa 731, 153 NW 336.

As to the appearance of multiple counsel, see § 228.

69. *Birmingham Loan & Auction Co. v First Nat. Bank*, 100 Ala 249, 13 So 945.

considerable deference and will not be reversed as long as some legitimate basis for the ruling is found.⁷⁰ The correctness of a ruling on evidence is to be determined by the situation as presented to the court when the evidence was offered.⁷¹

Evidence introduced over objection is regarded as admitted and will be considered by an appellate court unless the record shows that the trial court sustained the objection.⁷²

|||| Observation: Exceptions to rulings or orders of the court are unnecessary in federal court, and for all purposes for which an exception was once necessary in federal court, an objection now suffices.⁷³ No reversible error occurs when the trial court overrules objections to testimony or evidence already received or subsequently properly received into evidence.⁷⁴

§ 398. Practical and tactical use of objections

The immediate purpose of an objection is often to stop an answer to a question put to a witness.⁷⁵

|||| Recommendation: If the jury has heard excluded evidence, despite a sustained objection, objecting counsel should ask the trial judge for a cautionary instruction, or even, in cases of extreme prejudice to the party, to declare a mistrial.⁷⁶ Counsel's adroitness in asserting trial objections is frequently decisive to the outcome of the case; a well-timed oral objection which blocks a key aspect of the opponent's proof can tip the balance in favor of the objecting party.⁷⁷

Many attorneys will instinctively object to evidence with which they strongly disagree or that they know will hurt their case. Or, counsel may be aware that a particular line of questioning is leading to objectionable material.⁷⁸ Counsel also may object to an improper question, that is not harmful to the case, just to alert the witness to listen and respond carefully.⁷⁹ However, to object continuously to the same character of testimony after the trial court has said it was proper approaches disrespect for the ruling of the court.⁸⁰

70. *Stauffer Chemical Co. v Curry* (Wyo) 778 P2d 1083, 10 UCCRS2d 342.

71. *T. Barbour Brown & Co. v Canty*, 115 Conn 226, 161 A 91, 83 ALR 801; *Calder v Levi*, 168 Md 260, 177 A 392, 97 ALR 880.

Forms: Rulings on objections. 6 Am Jur Trials 605, Making and Preserving the Record—Objections §§ 28-31.

72. *Garl v Mihuta* (Lorain Co) 50 Ohio App 2d 142, 4 Ohio Ops 3d 107, 361 NE2d 1065.

73. **Practice References:** Federal Rules of Civil Procedure, Rule 46, as discussed in §3 Federal Procedure, L Ed, Trial § 77:188; Federal Rules of Criminal Procedure, Rule 51, as discussed in 9 Federal Procedure, L Ed, Criminal Procedure § 22:816.

74. *Williams v Crandell* (Ala) 514 So 2d 1267.

75. *Rowe v State*, 120 Fla 649, 163 So 22.

76. **Practice References:** Danner & Tothman, *Trial Practice Checklists* (1989) § 8:170.

77. **Practice References:** Carlson, *Successful Techniques for Civil Trial* (1983) § 2:2.

As to time of objection to evidence, generally, see §§ 401 et seq.

78. **Practice References:** Danner & Tothman, *Trial Practice Checklists* (1989) § 8:170.

79. **Practice References:** James S. Rogers, "Revising Outdated Trial Tactics," *Trial* (July 1989) p 73.

80. *McKee v Rudd*, 222 Mo 344, 121 SW 312.

■■■■ **Caution:** Objections made solely to disrupt the flow of evidence, with no basis in law, are unethical.⁸¹

An objection may be used to protect a witness from harassment or embarrassment on cross-examination;⁸² to bar evidence contradictory to admissions of fact in the pleadings;⁸³ to stop a line of questioning that is confusing to the jury or the witness; or to stop the examiner from unfairly leading the witness.⁸⁴

■■■■ **Recommendation:** Before making an objection, counsel should determine whether the question will elicit an answer helpful or, at least, neutrally harmless to the case. An answer may help directly, as by waiving a privilege, or indirectly, as by "opening the gates" to areas of testimony which could not be elicited on direct examination.⁸⁵

§ 399. —Objection techniques

Even in courts where the examination of witnesses takes place while counsel is seated, counsel should always rise to object and make the objection, or response thereto, to the court. Usually objections are made within the hearing of the jury, and it is tactically sound and advisable for jurors to hear certain objections, such as "leading the witness" and "argumentative." In limited circumstances, where the jury may draw adverse inferences from the grounds of an objection, counsel may wish only to object, and then request at the bench that the balance of the objection be placed in the record. Objections based on privilege grounds, for instance, will sometimes require such treatment. Because jurors may become antagonized by an over-objecting attorney, a major challenge to the trial practitioner is to develop a method for placing objections in the record without alienating the jury.⁸⁶

Objection techniques include—

- Rise and face the court.
- Object on schedule.
- Object the first time improper proof is offered and continue the objection if the opponent rephrases the same question.⁸⁷
- Address the objection and any responses to the trial judge; do not wrangle with counsel.
- Do not allow opposing counsel to lace questions with emotional terms.

81. Practice References: Danner & Toothman, *Trial Practice Checklists* (1989) § 8:170.

As to remarks or argument by counsel that opposing counsel was attempting to suppress facts by means of objections to testimony or evidence offered, see § 690.

82. Practice References: Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19:2.

83. *Marshall v Vise* (Tex) 767 SW2d 699, reh'g of cause overr (May 10, 1989) and on remand (Tex App Houston (1st Dist)) 1989 Tex App LEXIS 2922 (a party waives the right to rely upon an opponent's deemed admissions unless objection is made to the introduction of evidence contrary to those admissions); *Collision Center Paint & Body, Inc. v Campbell* (Tex App Dallas) 773 SW2d 354; *Escalona v Combs* (Tex App Houston (1st Dist)) 712

SW2d 822; *TransiLift Equipment, Ltd. v Cunningham*, 234 Va 84, 360 SE2d 183.

84. Practice References: Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19:2.

85. Practice References: Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19:2.

For discussion of direct and cross-examination of witnesses, generally, see 81 Am Jur 2d, *Witnesses* §§ 416 et seq.

86. Practice References: Carlson, *Successful Techniques for Civil Trial* (1983) § 2:29.

Forms: Instruction—Duty of attorney to protect interests of client—Jury not to be influenced by objections of attorneys. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 127.

87. As to running or continuing objections, see § 402.

- Do not argue with the court after it has ruled.
- Do not continually note exceptions after the court has ruled adversely on the objection, as the need to take such exceptions has been largely abolished.⁸⁸
- Place a continuing or running objection in the record where several question elicit objectionable matter if two or more objections are overruled; this helps avoid the image of “over-objectioning.”⁸⁹

■■■■ *Reminder:* It is essential that trial attorneys preserve the testimony of their witnesses in the event of appellate review. Thus, counsel must recognize when their witnesses are giving nonverbal testimony, such as gestures or vague references to maps, charts, diagrams, and physical objects and insure that such nonverbal testimony is reflected in the record.⁹⁰

§ 400. —Checklist of common objections

Common trial objections to the introduction of evidence may be summarized as follows:⁹¹

- Irrelevant evidence: the question—
 - Seeks information which is of no probative value in the case; the issue is outside the pleadings.
 - Is cumulative, asked and answered.
 - Calls for proof of remedial measures, not relevant or admissible to prove negligence.
 - Seeks to elicit testimony about offers of compromise, inadmissible to prove liability.
 - Seeks to elicit testimony about offers to pay medical expenses, not admissible to prove fault.
 - Seeks to elicit testimony about offers to plead guilty in a companion criminal case, inadmissible as evidence in a civil trial.
 - Seeks to disclose the existence of liability insurance.
 - Seeks to disclose wealth or poverty of a party.
- Prejudicial evidence: the question—
 - Will inflame the jury.
 - Will confuse the issues.
 - May mislead the jury.
 - Results in a waste of time.
 - Has some relevance but its probative worth is highly outweighed by its inflammatory and prejudicial character.
- Form of question: the question is—
 - Ambiguous.
 - Argumentative.
 - Assumes a fact not in evidence.

88. As to exceptions, generally, see §§ 483 et seq.

89. *Practice References:* Carlson, *Successful Techniques for Civil Trial* (1983) § 2:29.

90. § 358.

91. *Practice References:* Carlson, *Successful Techniques for Civil Trial* (1983) § 2:2.

For discussion of sufficiency and specificity of grounds for objection, see §§ 424 et seq.

As to inadmissible evidence, generally, see 29 Am Jur 2d, *Evidence* §§ 251 et seq.

- Comment of the evidence.
- Compound.
- Confusing.
- Cumulative.
- General and calls for a narrative answer.
- Indefinite as to time and place.
- Leading.
- Misstates the evidence.
- Multiple.
- Solicits an opinion from an unqualified expert.
- Repetitive.
- Vague.
- Other bases of objection: questions respecting—
 - Competence of witnesses to testify.
 - Qualifications and use of experts.
 - Foundational requirements of documentary evidence.⁹²
 - Scope of direct and cross-examination.
 - Privileges.

■■■■ **Observation:** An objection that evidence is “incompetent,” “irrelevant,” or “immaterial” is ordinarily regarded in most jurisdictions, in the absence of any statutory provision to the contrary, as not sufficiently definite to present any question for review.⁹³

2. TIMELINESS OF OBJECTION [§§ 401–410]

a. IN GENERAL [§§ 401–404]

§ 401. Necessity of contemporaneous objection

In order to preserve the right to have a question reviewed, a party feeling aggrieved by any incident in the progress of a trial must make his objection known at the earliest opportunity,⁹⁴ when the occasion therefor arises,⁹⁵ or as soon as the potential objector has the opportunity to learn that the evidence is objectionable, unless there is some specific reason for a postponement.⁹⁶

92. For discussion of the significance, generally, of foundational requirements for the introduction of documentary evidence, see § 347.

93. § 428.

94. T.C. Young Constr. Co. v Brown (Ky) 372 SW2d 670, 99 ALR2d 730; Moore v Clark (La App 1st Cir) 517 So 2d 293; Lusby v State, 217 Md 191, 141 A2d 893, 74 ALR2d 695; Universal Adjustment Corp. v Midland Bank, Ltd., 281 Mass 303, 184 NE 152, 87 ALR 1407.

Practice References: Timeliness of objection. 6 Am Jur Trials 605, Making and Preserving the Record—Objections § 12.

95. Gaines v Washington, 277 US 81, 72 L Ed 793, 48 S Ct 468; Voorhees v Jackson, 35 US 449, 9 L Ed 490; Shannon v Shaffer Oil &

Refining Co. (CA10 Okla) 51 F2d 878, 78 ALR 851; Hogan v Santa Fe Trail Transp. Co., 148 Kan 720, 85 P2d 28, 120 ALR 521; Commonwealth v Polian, 288 Mass 494, 193 NE 68, 96 ALR 615.

96. Tripp v Pate, 49 NC App 329, 271 SE2d 407.

Except where a party is not afforded an opportunity to object to an evidentiary ruling, a contemporaneous objection is necessary for appellate review. Mullet v State (La App 4th Cir) 539 So 2d 897, cert den (La) 541 So 2d 1390 and cert den (La) 541 So 2d 1390 and (disagreed with on other grounds by Dubois v State Farm Ins. Co. (La App 3d Cir) 571 So 2d 201, later proceeding (La App 3d Cir) 571 So 2d 208 and cert den (La) 575 So 2d 367).

Objections are timely made when the evidence is offered,⁹⁷ introduced,⁹⁸ or admitted.⁹⁹

■■■■ Observation: In federal court, under the Federal Rules of Evidence, the proper time to object to the admission of evidence is at the time it is offered,¹ when such objections first arise,² or at the earliest opportunity after the ground for objection becomes apparent.³ Where questions are propounded to the witness by the court, objections may be made at the time of the objectionable question or at the next available opportunity when the jury is not present.⁴

The requirement of contemporaneous objection to evidence which a party believes to be inadmissible is to afford the trial court an opportunity to rule on the evidence before it is heard by the jury.⁵

■■■■ Practice guide: If the jury has heard excluded evidence, despite a sustained objection, objecting counsel should ask the trial judge for a cautionary instruction, or even, in cases of extreme prejudice to the party, to declare a mistrial.⁶

§ 402. —Running or continuing objection

Where there is objection to the admission of evidence involving a specified

97. *Blue Cross of Western New York v Bukulmez* (Colo) 736 P2d 834; *Romanek-Golub & Co. v Anvan Hotel Corp.* (1st Dist) 168 Ill App 3d 1031, 119 Ill Dec 482, 522 NE2d 1341; *Bienvenu v State Farm Mut. Auto. Ins. Co.* (La App 5th Cir) 545 So 2d 581.

An objection to the admission of evidence of prior occurrences was properly overruled as premature where the objection was made at a time when the plaintiff had not yet proffered the evidence of prior occurrences. *Marois v Paper Converting Machine Co. (Me)* 539 A2d 621, *CCH Prod Liab Rep* ¶ 11696.

Plaintiff's objection to certain portions of defendant's testimony was not timely where she did not object at the time the testimony was offered but instead moved to strike the testimony at the conclusion of all her evidence. *Tripp v Pate*, 49 NC App 329, 271 SE2d 407.

98. *Blue Cross of Western New York v Bukulmez* (Colo) 736 P2d 834.

99. *Jones v Consolidation Coal Co.* (5th Dist) 174 Ill App 3d 38, 123 Ill Dec 649, 528 NE2d 33; *Moore v Clark* (La App 1st Cir) 517 So 2d 293.

A motion to exclude a document is too late if made 2 years after its admission, upon conclusion of the taking of testimony. *New Mexico v Texas*, 275 US 279, 72 L Ed 280, 48 S Ct 126, *mod* 276 US 558, 72 L Ed 699, 48 S Ct 344.

1. *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929, *cert den* 469 US 1106, 83 L Ed 2d 774, 105 S Ct 779, *later proceeding* (CA3 Pa) 813 F2d 596, *cert den*

484 US 822, 98 L Ed 2d 45, 108 S Ct 83; *Reagan v Brock* (CA1 Mass) 628 F2d 721, 6 Fed Rules Evid Serv 896; *United States v Jamerson* (CA9 Wash) 549 F2d 507.

Practice References: 12 Federal Procedure, L Ed, Evidence § 33:20.

2. *United States v Chiarizio* (CA2 Conn) 525 F2d 289.

Practice References: 12 Federal Procedure, L Ed, Evidence § 33:20.

3. *Terrell v Poland* (CA8 Ark) 744 F2d 637, 16 Fed Rules Evid Serv 818.

Practice References: 12 Federal Procedure, L Ed, Evidence § 33:20.

4. **Practice References:** Federal Rules of Evidence, Rule 614(c), as discussed in 33 Federal Procedure, L Ed, Witnesses § 80:50.

As to the necessity of objecting to inadmissible questions propounded by the court, see § 395.

5. *Stanley v De Cesere* (Me) 540 A2d 767; *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464.

When counsel made a general objection in chambers to all testimony from witnesses concerning the plaintiff's inability to get a job and the break up of his marriage, it was too late to separate direct observation from alleged hearsay and, under such circumstances, the objection was untimely. *Starkins v Bateman* (App) 150 Ariz 537, 724 P2d 1206 (*defamation action*).

6. § 398.

line of questioning, it is deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning.⁷ Thus, where an objection is duly taken to the admission of a certain line of testimony, and an exception to the ruling of the court thereon is properly preserved, the party objecting is not required, in order to save the question for review, to object to each question thereafter asked the witness concerning the same matter covered by the objection already made.⁸ At the request of a party or on its own initiative, the trial court may grant a continuing objection to a line of questions by an opposing party, but, for purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope.⁹ In the absence of a continuing, or running, objection, specific objections to each question are necessary to preserve an issue for appeal.¹⁰

Practice guide: The proper use of a running or continuing objection can deflect jury antagonism from the objecting counsel. Counsel should interpose an objection, after one or two have been overruled with respect to testimony on an objectionable matter from the same conversation or transaction, to the entire line of such questioning on a specified ground, such as hearsay. Counsel should listen as further questions are asked, to add other independent grounds.¹¹

In order to obtain the benefit of a running or continuing objection, the objecting party must precisely define the objectionable line of questioning or the line of questioning objected to must be apparent to the court and the parties.¹² Thus, the evidentiary objections of a party, having failed to object when the testimony was elicited and having failed to advise the court that a previous timely objection was a continuing one, are untimely and do not preserve the alleged error for review.¹³

A running objection is an effective objection to all evidence sought to be excluded where trial is to the court and an objection is clearly made to the judge.¹⁴

Observation: Federal courts have differed as to whether, after a ruling against the admission of evidence, a party need make a continuing objection to preserve the matter for appeal.¹⁵

7. *Re Powers* (Ala App) 523 So 2d 1079; *Butler & Sidbury, Inc. v Green Street Baptist Church*, 90 NC App 65, 367 SE2d 380.

8. *Re Powers* (Ala App) 523 So 2d 1079; *People v Rogers*, 348 Ill 322, 180 NE 856, 82 ALR 1124; *Truitt v Truitt's Adm'r*, 290 Ky 632, 162 SW2d 31, 140 ALR 1127; *Noteboom v Savin*, 213 Or 583, 322 P2d 916, reh den 213 Or 592, 326 P2d 772.

As to the necessity of a formal exception, see § 485.

9. *Re Powers* (Ala App) 523 So 2d 1079 (by implication); *Beghtol v Michael*, 80 Md App 387, 564 A2d 82, cert den 318 Md 514, 569 A2d 643.

10. *Beghtol v Michael*, 80 Md App 387, 564 A2d 82, cert den 318 Md 514, 569 A2d 643.

As to the sufficiency of objections to evidence, generally, including specificity, see §§ 424 et seq.

11. **Practice References:** Carlson, *Successful Techniques for Civil Trial* (1983) § 2:29.

12. *Butler & Sidbury, Inc. v Green Street Baptist Church*, 90 NC App 65, 367 SE2d 380.

13. *Starkins v Bateman* (App) 150 Ariz 537, 724 P2d 1206.

As to the effect of failure to make timely objection, see §§ 405 et seq.

14. *Commerce, Crowds & Canton, Ltd. v DKS Constr., Inc.* (Tex App Dallas) 776 SW2d 615.

15. 12 Federal Procedure, L Ed, Evidence § 33:23.

§ 403. Objectionable question and answer distinguished

When the question asked of a witness is itself improper, or calls for an improper answer, an objection not interposed until after the witness has answered is too late.¹⁶ To permit an objection to be made after an incompetent question has been asked and answered would give the objector the unfair advantage to exclude the testimony if unfavorable to him or to make use of it if favorable.¹⁷ However, where an objection to the competency of evidence is made after it has been admitted, if the ruling of the court is put on the ground of competency, and not of delay in objecting, the question is preserved for review.¹⁸ For instance, where the inadmissibility is due to some feature of the answer given by the witness to a question which in itself is unobjectionable, then objection may be taken to the testimony given.¹⁹

When an answer to a question is directly responsive, it will usually be permitted to stand unless a timely objection was made to the question propounded.²⁰

An objection is timely if made when the grounds for a motion to strike testimony first become apparent,²¹ and may be timely made, in some circumstances, upon a motion to strike.²²

Caution: If the witness answers an objectionable question before counsel can timely object, an objection not accompanied by a motion to strike generally will not be heard.²³

Recommendation: If counsel is tardy with an objection, counsel is cautioned not to simply object after the answer is in. Counsel is advised to couple the objection with a motion to strike, and to request an admonishing instruction from the court directing the jury to disregard the answer. If the information was serious and damaging, especially if it appears to have been volunteered by the witness in bad faith, counsel should consider requesting the court to declare a mistrial.²⁴

Failure to timely object may result in a waiver of the objection or a ruling thereon.²⁵

§ 404. Anticipating grounds for objection; motion in limine

Although a party is not bound to contemplate a decision of the case before his evidence is heard, and is therefore not bound to ask a ruling or to take

16. *Kinsey v State*, 49 Ariz 201, 65 P2d 1141, 125 ALR 3; *Oakes v Peter Pan Bakers, Inc.*, 258 Iowa 447, 138 NW2d 93, 10 ALR3d 247; *Ricard v Prudential Ins. Co.*, 87 NH 31, 173 A 375, 93 ALR 784.

17. *St. Louis & S.F.R. Co. v Sutton*, 169 Ala 389, 55 So 989; *Hackenson v Waterbury*, 124 Conn 679, 2 A2d 215; *State v Pope*, 287 NC 505, 215 SE2d 139.

18. *Lucas v United States*, 163 US 612, 41 L Ed 282, 16 S Ct 1168.

19. *Hackenson v Waterbury*, 124 Conn 679, 2 A2d 215.

20. *State v Pope*, 287 NC 505, 215 SE2d 139.

21. *Longtree, Ltd. v Resource Control Int'l, Inc. (Wyo)* 755 P2d 195, 8 UCCRS2d 443.

22. *Lucas v United States*, 163 US 612, 41 L Ed 282, 16 S Ct 1168; *Wysock v Borchers Bros.*, 104 Cal App 2d 571, 232 P2d 531, 29 ALR2d 948; *Schroeck v Terminal Railroad Asso. (Mo)* 305 SW2d 18, 62 ALR2d 1416.

As to the necessity of an objection prerequisite to a motion to strike, see § 470.

23. **Practice References:** *Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19:3.

24. **Practice References:** *Carlson, Successful Techniques for Civil Trial* (1983) § 2:29.

25. §§ 412 et seq.

other precautions in advance,²⁶ wherever possible, counsel should anticipate in advance of trial whether opposing counsel will attempt to introduce objectionable evidence and make a pretrial motion in limine to exclude such evidence.²⁷

■■■ Caution: Counsel should be aware that in some jurisdictions, an objection, in written response to a motion in limine, must be made not only at the hearing of the motion but, more importantly, must be renewed upon introduction of the evidence at trial, to preserve the matter for appeal.²⁸

Where a party's objections are well known, and where the subject matter of the testimony was the basis for a previous motion in limine in which such evidence was excluded, the plaintiff does not waive an alleged error by failing to make a formal offer of proof.²⁹

b. FAILURE TO TIMELY OBJECT [§§ 405–410]

§ 405. Generally

The question of the admissibility of evidence cannot ordinarily be raised for the first time by an objection to instructions or charges relating thereto,³⁰ or upon a motion for a new trial.³¹

Because an appellate court will not consider an objection which was not raised in the trial court,³² a party cannot later assert a ground for objection to the admission of evidence which was not made at the trial.³³

²⁶ *Saunders v Shaw*, 244 US 317, 61 L Ed 1163, 37 S Ct 638.

²⁷ **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19:2.

As to motions in limine, including their advantages and disadvantages, see §§ 94 et seq.

Annotations: Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311.

Forms: Motion—To obtain preliminary ruling on admissibility of anticipated evidence—Stating grounds of objection thereto. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 71.

²⁸ *Frein v Madesco Invest. Corp.* (Mo App) 735 SW2d 760.

For discussion of waiver by failure to object to evidence, generally, see §§ 405 et seq.

As to procedure upon denial of a motion in limine to exclude evidence, see § 112.

²⁹ § 443.

³⁰ *Teal v Bilby*, 123 US 572, 31 L Ed 263, 8 S Ct 239.

An objection on the ground of the insufficiency of the evidence must be made before the submission of the case. *Carpenter v Carpenter*, 78 NH 440, 101 A 628; *Laferriere v*

Saliba, 119 Vt 25, 117 A2d 380; *Loomis v Graves*, 116 Vt 438, 77 A2d 838.

³¹ *People v Auerbach*, 176 Mich 23, 141 NW 869; *Estate of Hartz v Nelson* (Minn App) 437 NW2d 749; *Farmers' State Bank v Hess*, 138 Okla 190, 280 P 305, 66 ALR 894.

Where the plaintiff in an action seeking a reduction in child support waited for over a year after a bankruptcy petition was dismissed against him to renew a motion for reduction of child support so that the evidence he contended should have been considered by the trial court was not brought to the court's attention again until 1 year after the conclusion of the bankruptcy proceedings, the trial court properly excluded the evidence and the plaintiff waived his right to complain of error. *Schmidt v Schmidt* (ND) 432 NW2d 860.

³² § 406.

³³ *Moore v Clark* (La App 1st Cir) 517 So 2d 293; *Estate of Hartz v Nelson* (Minn App) 437 NW2d 749; *MCI Telecommunications Corp. v Tarrant County Appraisal Dist.* (Tex App Fort Worth) 723 SW2d 350.

If not invoked at trial via proper objection, the right to later object to parole evidence is waived and may not subsequently be invoked in an attempt to exclude evidence. *Polk v State* (La App 3d Cir) 517 So 2d 1178, cert gr (La) 521 So 2d 1176 and amd on other grounds (La) 538 So 2d 239.

§ 406. Effect on appeal

Unless timely³⁴ and sufficient objection³⁵ is made to the introduction of inadmissible evidence, and exception taken to its admission over the objection made, the reviewing court ordinarily will not consider the question of the propriety of the admission of the evidence.³⁶ The objection is waived for purposes of review.³⁷ However, plain errors affecting substantive rights may be noticed on appeal even though they were not brought to the attention of the trial court below by means of a proper objection thereto.³⁸

|||| Observation: For the lawyer who fails to make a timely objection, the only hope for review may be the plain error rule which allows reviewing courts to take notice of plain errors affecting substantial rights, even though they were not brought to the attention of the trial court.³⁹

§ 407. Effect on scope of cross-examination

If incompetent evidence has been admitted against objection, and exception taken, the objecting party may cross-examine upon or otherwise combat it, without waiving his right to have the exception reviewed on appeal,⁴⁰ although a waiver may result from exceeding the proper scope of direct or cross-examination.⁴¹

§ 408. Effect on admissibility of evidence

A failure to object to evidence waives objection to its admissibility and the aggrieved party may not subsequently upon appeal urge that such evidence was actually inadmissible.⁴² In practical effect, evidence is admissible unless a timely objection to its admission is raised,⁴³ and otherwise inadmissible evidence can become, for all purposes,⁴⁴ competent evidence where the party

As to waiver of objection or a ruling thereon, see §§ 412 et seq.

34. § 401.

35. § 424.

36. 5 Am Jur 2d, Appeal and Error §§ 601 et seq.

37. §§ 412 et seq.

38. *People v Meier* (2d Dist) 30 Ill App 3d 1, 332 NE2d 1.

39. **Practice References:** Carlson, *Successful Techniques for Civil Trial* (1983) § 2:28.

40. *Strickland v Perry* (CA5 Fla) 244 F2d 24, cert den 355 US 847, 2 L Ed 2d 56, 78 S Ct 72; *Wysock v Borchers Bros.*, 104 Cal App 2d 571, 232 P2d 531, 29 ALR2d 948; *Shaw v Terminal R. Asso. (Mo)* 344 SW2d 32, 93 ALR2d 265; *State v Chavers (Tex)* 454 SW2d 395.

As to a waiver of objection, see §§ 411 et seq.

41. § 419.

42. *Creger v Robertson* (La App 2d Cir) 542 So 2d 1090.

The reception of inadmissible evidence that has at some other point been admitted is harmless error. *Starkins v Bateman* (App) 150 Ariz 537, 724 P2d 1206.

As to a waiver of objection, see §§ 411 et seq.

43. *Gibson v Swanson*, 239 Mont 380, 780 P2d 1137; *Re Estate of Giacalone* (2d Dept) 143 App Div 2d 749, 533 NYS2d 457.

The defendant was not entitled to a new trial, despite the admission of incompetent evidence, where he failed to object to its admission. *State v Joyner*, 54 NC App 129, 282 SE2d 520, petition den 304 NC 730, 287 SE2d 903.

44. *Starkins v Bateman* (App) 150 Ariz 537, 724 P2d 1206; *Sheehan v Goriansky*, 321 Mass 200, 72 NE2d 538, 173 ALR 497; *State v Petro*, 148 Ohio St 473, 36 Ohio Ops 152, 76 NE2d 355, 5 ALR2d 425 (hearsay); *Commonwealth v Boden*, 399 Pa 298, 159 A2d 894, 88 ALR2d 223, cert den 364 US 846, 5 L Ed 2d 70, 81 S Ct 89.

opposing its introduction fails to raise a proper objection to it.⁴⁵ Evidence received without objection becomes part of the evidence in the case,⁴⁶ and counsel may comment on it.⁴⁷ Moreover, when inadmissible evidence is permitted to be introduced without objection, the court and jury may give it such probative effect and value as it is entitled to, notwithstanding that it would or should have been excluded if properly objected to.⁴⁸ Thus, in some jurisdictions, inadmissible hearsay admitted without objection will not be denied probative value merely because it is hearsay,⁴⁹ and the unsuccessful party may not question a verdict because it is based upon otherwise inadmissible evidence.⁵⁰ But, hearsay testimony, even received without objection, cannot be used in other jurisdictions to support any findings unless corroborated by competent evidence otherwise found in the record.⁵¹

If the evidence has no probative force, or insufficient probative value to sustain the proposition for which it is offered, the want of objection adds nothing to its worth and will not support a finding.⁵² Immaterial evidence, even if received, has no probative value and should not be considered.⁵³

45. *Mosesian v Pennwalt Corp.* (5th Dist) 191 Cal App 3d 851, 236 Cal Rptr 778 (hearsay); *Wayne Smith Constr. Co. v Wolman, Duberstein, & Thompson* (App) 294 SC 140, 363 SE2d 115.

46. *Cohen v Cohen*, 11 Conn App 241, 527 A2d 245.

47. *Bell v State*, 120 Ark 530, 180 SW 186; *Chicago & E.I.R. Co. v Mochell*, 193 Ill 208, 61 NE 1028; *State v Folsom*, 28 Wash 2d 421, 183 P2d 510.

Annotations: Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 ALR2d 890 § 9.

48. *Opp Cotton Mills, Inc. v Administrator of Wage & Hour Div.*, 312 US 126, 85 L Ed 624, 61 S Ct 524, 3 CCH LC ¶ 51109; *Spiller v Atchison, T. & S.F.R. Co.*, 253 US 117, 64 L Ed 810, 40 S Ct 466; *Armstrong v Armstrong* (Ala App) 515 So 2d 27; *State v Service Engraving Co.* (Ala App) 495 So 2d 695; *Crawford v Nastos* (2nd Dist) 182 Cal App 2d 659, 6 Cal Rptr 425, 97 ALR2d 840; *Cohen v Cohen*, 11 Conn App 241, 527 A2d 245; *Griffith v Newman*, 217 Ga 533, 123 SE2d 723, 2 ALR3d 956; *Koppers Co. v Inland Steel Co.* (Ind App) 498 NE2d 1247; *Harrigan v Freeman* (La App 1st Cir) 498 So 2d 58, 78 ALR4th 601; *Goldthwaite v Sheraton Restaurant*, 154 Me 214, 145 A2d 362, 79 ALR2d 881; *Miller v Presswood* (Tex App Beaumont) 743 SW2d 275, writ den (Apr 19, 1989).

Annotations: Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 ALR3d 671 § 12 (coconspirator's statements).

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 ALR2d 890 §§ 3, 8, 17.

49. *Mosesian v Pennwalt Corp.* (5th Dist) 191 Cal App 3d 851, 236 Cal Rptr 778; *Coleman v Victor* (La) 326 So 2d 344; *Lopez v State* (Tex App San Antonio) 775 SW2d 857; *Miller v Presswood* (Tex App Beaumont) 743 SW2d 275, writ den (Apr 19, 1989) (hearsay evidence was admissible to establish the existence of a partnership between the two defendants on the basis of one defendant's assertion that the partnership existed); *Re Guardianship of Marshall*, 46 Wash App 339, 731 P2d 5.

50. *American Workmen v Ledden*, 196 Ark 902, 120 SW2d 346, 120 ALR 201; *Superior Oil Co. v Griffin* (Okla) 357 P2d 987, 14 OGR 240, 87 ALR2d 224.

By failing to object when a question was put to the witness, the defendant waived his right to do so, and the admission of such evidence, even though incompetent, would not entitle him to a new trial. *State v Joyner*, 54 NC App 129, 282 SE2d 520, petition den 304 NC 730, 287 SE2d 903.

Annotations: 79 ALR2d 890 §§ 6, 13 (hearsay evidence).

51. *G.W.K. v Commonwealth*, Dept. of Public Welfare, 125 Pa Cmwlt 512, 558 A2d 151; *D.J.P. v Commonwealth*, Dept. of Public Welfare, 118 Pa Cmwlt 569, 545 A2d 496; *Unemployment Compensation Board of Review v Cooper*, 25 Pa Cmwlt 256, 360 A2d 293 (administrative proceeding).

As to admissibility of hearsay, generally, see 29 Am Jur 2d, Evidence §§ 493 et seq.

52. *Cohen v Cohen*, 11 Conn App 241, 527 A2d 245.

53. *Eisentrager v Great N.R. Co.*, 178 Iowa 713, 160 NW 311.

§ 409. Effect on subsequent exclusion of evidence

A party, notwithstanding his failure to object, may move before the case is to be submitted to the jury to have the evidence excluded.⁵⁴ But, the trial court's action in refusing to exclude evidence has been upheld where objection to the introduction of certain evidence was first made after the close of all the evidence and just before the instructions to the jury,⁵⁵ and where the objection was not made until after the defendant had moved for a nonsuit and had opened the case to the jury.⁵⁶

Where the trial court allows the plaintiffs to raise an objection to the admissibility of evidence after the trial is completed, the defendants are denied the opportunity to present evidence to refute it, to their obvious prejudice.⁵⁷

§ 410. —Court's discretion

The fact that counsel fails to timely object to the introduction of evidence which is incompetent and offered without a foundation does not preclude the trial court from exercising its discretion *sua sponte* to exclude the testimony on foundation or competency grounds notwithstanding the failure to lodge an objection.⁵⁸ But, although there is some authority to the contrary,⁵⁹ the prevailing rule is that where objection is not made to evidence or to the question calling for it, it is not a matter of right in the party against whom it is given to have the evidence excluded on motion,⁶⁰ if no reason is given for the failure to object,⁶¹ but its exclusion is in the discretion of the court.⁶²

If evidence is introduced, over objection that it is irrelevant, upon the theory that its relevancy may be shown by subsequent evidence, and if such evidence is not subsequently introduced, the court may exclude the irrelevant evidence on its own motion.⁶³

3. WAIVER [§§ 411–423]**a. IN GENERAL [§ 411]****§ 411. Generally; express and implied waiver distinguished**

Silence, when there is opportunity to speak, may operate as a waiver of

54. *Patton v Bank of La Fayette*, 124 Ga 965, 53 SE 664.

55. *Warren v State*, 103 Ark 165, 146 SW 477.

56. *Luckett v Reighard*, 248 Pa 24, 93 A 773.

57. *Moore v Clark* (La App 1st Cir) 517 So 2d 293.

58. *MacCurdy v United States* (CA5 Fla) 246 F2d 67, cert den 355 US 933, 2 L Ed 2d 416, 78 S Ct 415; *Fairburn v Cook*, 188 Ga App 58, 372 SE2d 245, later proceeding 195 Ga App 265, 393 SE2d 70; *Rich v Rogers*, 250 Mass 587, 146 NE 246, 37 ALR 656; *Anderson v Asphalt Distributing Co. (Mo)* 55 SW2d 688, 86 ALR 1033; *State v Boehm*, 68 ND 340, 279 NW 824, 116 ALR 547.

59. *Patton v Bank of La Fayette*, 124 Ga 965, 53 SE 664; *Silver v State*, 110 Tex Crim 512, 8

SW2d 144, 60 ALR 290, application den 110 Tex Crim 521, 9 SW2d 358, 60 ALR 297.

60. *Anderson v Asphalt Distributing Co. (Mo)* 55 SW2d 688, 86 ALR 1033; *Schuett v Hargens*, 173 Neb 663, 114 NW2d 508, 93 ALR2d 752; *State v Boehm*, 68 ND 340, 279 NW 824, 116 ALR 547.

61. *Walrod v Webster County*, 110 Iowa 349, 81 NW 598.

62. *MacCurdy v United States* (CA5 Fla) 246 F2d 67, cert den 355 US 933, 2 L Ed 2d 416, 78 S Ct 415; *Rich v Rogers*, 250 Mass 587, 146 NE 246, 37 ALR 656; *Anderson v Asphalt Distributing Co. (Mo)* 55 SW2d 688, 86 ALR 1033; *State v Boehm*, 68 ND 340, 279 NW 824, 116 ALR 547.

63. 29 Am Jur 2d, Evidence § 254.

objections to errors and irregularities at the trial which, if seasonably made and presented, might even have been regarded as prejudicial.⁶⁴

■■■■ Observation: Counsel may expressly or impliedly waive an objection to evidence. An express waiver occurs when counsel withdraws an objection; an implied waiver occurs when a timely objection, specifically asserting proper grounds, does not appear to offered proof. The waiver doctrine may also be applied to an inartful examination by counsel, as where counsel opens the door to privileged information, and the privilege is thereby waived.⁶⁵

b. FAILURE TO OBJECT [§§ 412-416]

§ 412. Generally

If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction,⁶⁶ or fails to object⁶⁷ with the

64. *Kuiken v Garrett*, 243 Iowa 785, 51 NW2d 149, 41 ALR2d 1397; *State v Jackson*, 336 Mo 1069, 83 SW2d 87, 103 ALR 339; *Malone v Melnick*, 378 Pa 483, 106 A2d 806, 48 ALR2d 1254.

Failure to timely object to evidence at the time of its admission is a waiver to later claiming error, and once evidence is admitted without objection or with a waiver to objection, the jury may consider it. *Tynes v Alabama G.S.R. Co.* (Ala App) 550 So 2d 427.

As to what constitutes waiver of an objection in federal court actions, generally, see 12 Federal Procedure, L Ed, Evidence §§ 33:687, 33:688.

65. Practice References: Carlson, *Successful Techniques for Civil Trial* (1983) §§ 2:2, 2:29, 2:33.

66. *Thompson v Thompson*, 91 Ala 591, 8 So 419; *Chicago, S.L. & P.R. Co. v Wolcott*, 141 Ind 267, 39 NE 451; *Griffith v Griffith*, 230 Neb 314, 431 NW2d 609; *Re Kaiser's Estate*, 150 Neb 295, 34 NW2d 366; *State v Gee Jon*, 46 Nev 418, 211 P 676, 30 ALR 1443, reh den 46 Nev 438, 217 P 587, 30 ALR 1451; *State v Jeffries*, 55 NC App 269, 285 SE2d 307, app dismd 305 NC 398, 290 SE2d 367.

Where appellants' counsel stated at trial that he had no objection to the introduction of evidence, the appellants waived any further objection. *Central Financial Control v Davis* (La App 4th Cir) 537 So 2d 225.

Evidence has been designated as "consent evidence" where it is admitted without objection and no motion is made to strike it from the record. *Goldthwaite v Sheraton Restaurant*, 154 Me 214, 145 A2d 362, 79 ALR2d 881.

An implied consent law, making inadmissible in a civil case the results of blood test upon a motorist, and which was created as a privilege to benefit of the individual whose blood was

taken and tested, may be waived by such individual, even in an action in which he is not a party, by testimony that he has no objection whatsoever to the introduction of such test results. *Bryant v Alpha Entertainment Corp.* (Miss) 508 So 2d 1094 (diverged from by *Whitehurst v State* (Miss) 540 So 2d 1319).

67. *Segurola v United States*, 275 US 106, 72 L Ed 186, 48 S Ct 77; *Bradstreet v Thomas*, 37 US 174, 9 L Ed 1044; *Tynes v Alabama G.S.R. Co.* (Ala App) 550 So 2d 427; *Bradley v State*, 35 Ariz 420, 279 P 256; *Mosesian v Pennwalt Corp.* (5th Dist) 191 Cal App 3d 851, 236 Cal Rptr 778; *Blue Cross of Western New York v Bukulmez* (Colo) 736 P2d 834; *Cohen v Cohen*, 11 Conn App 241, 527 A2d 245; *Smith v State*, 186 Ga App 303, 367 SE2d 573, later app 192 Ga App 18, 383 SE2d 600; *Goodale v Murray*, 227 Iowa 843, 289 NW 450, 126 ALR 1121; *Bienvenu v State Farm Mut. Auto. Ins. Co.* (La App 5th Cir) 545 So 2d 581; *Cregger v Robertson* (La App 2d Cir) 542 So 2d 1090; *Polk v State* (La App 3d Cir) 517 So 2d 1178, cert gr (La) 521 So 2d 1176 and amd on other grounds (La) 538 So 2d 239; *Belk v Montgomery Ward & Co.* (La App 2d Cir) 501 So 2d 1008; *Thibodeaux v Western World Ins. Co.* (La App 3d Cir) 391 So 2d 24; *Mueller v Soffer* (5th Dist) 160 Ill App 3d 699, 112 Ill Dec 589, 513 NE2d 1198; *Greig v Griffel* (2d Dist) 49 Ill App 3d 829, 7 Ill Dec 499, 364 NE2d 660; *Marois v Paper Converting Machine Co.* (Me) 539 A2d 621, CCH Prod Liab Rep ¶ 11696; *Griffith v Griffith*, 230 Neb 314, 431 NW2d 609; *Re Kaiser's Estate*, 150 Neb 295, 34 NW2d 366; *Tyrpak v Lee*, 108 NM 153, 768 P2d 352; *Re Estate of Giacalone* (2d Dept) 143 App Div 2d 749, 533 NYS2d 457; *State v Pope*, 287 NC 505, 215 SE2d 139; *Morris v Bailey*, 86 NC App 378, 358 SE2d 120; *State v Joyner*, 54 NC App 129, 282 SE2d 520, petition den 304 NC 730, 287 SE2d 903; *Tripp v Pate*, 49 NC App 329, 271 SE2d 407; *Cogdill v Watson*

requisite degree of specificity,⁶⁸ or to insist upon a ruling on an objection to the introduction of such evidence,⁶⁹ and otherwise fails to raise the question as to its admissibility,⁷⁰ as by a motion to strike,⁷¹ such party waives any objection thereto, and the evidence is in the record for consideration the same as other evidence.⁷² However, there can be no waiver of the rights to object to evidence relevant to a defense which was not pleaded in any form.⁷³

Caution: Failure to make a timely objection to evidence in federal court, in civil and criminal actions, also results in a waiver of the issue on appeal, even though the improper question was propounded by the trial court and, further, failure to timely object or move to strike prevents such party from later moving for a mistrial on the grounds that the evidence was prejudicial.⁷⁴

§ 413. Failure to renew or repeat objection

When questions to which an objection and exception have been taken are not answered until after the interpolation of another question, and they are then repeated and answered without any further objection, the original objection will be deemed to have been waived.⁷⁵

Generally, where evidence is apparently competent when it is admitted over objection, but its incompetency is made apparent by testimony which follows,

(App) 289 SC 531, 347 SE2d 126; *United Cab Co. v Mason* (Tex App Houston (1st Dist)) 775 SW2d 783; *Cross v Houston B. & T.R. Co.* (Tex Civ App Houston (1st Dist)) 351 SW2d 84, 96 ALR2d 1.

Annotations: Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 ALR3d 671 § 12 (coconspirator's statements).

68. § 424.

69. *United States v McCoy*, 193 US 593, 48 L Ed 805, 24 S Ct 528; *Vassar v State*, 139 Fla 213, 190 So 434; *State v Patchett*, 203 Kan 642, 455 P2d 580; *State ex rel. State Highway Com. v Hart* (Mo App) 417 SW2d 193; *Griffith v Griffith*, 230 Neb 314, 431 NW2d 609; *Re Kaiser's Estate*, 150 Neb 295, 34 NW2d 366.

Although counsel for defendants properly objected to a line of questioning, the objection subsequently was waived by counsel's advising the client to answer the question before the judge ruled on the objection. *Sparacello v Andrews* (La App 1st Cir) 501 So 2d 269, cert den (La) 502 So 2d 103.

Where evidence is received upon a trial, subject to a future ruling on its admissibility, the party wishing to avail himself thereof should, at the proper time, secure a ruling thereon, so that it may appear of record. *Ross v Minnesota Mut. L. Ins. Co.*, 154 Minn 186, 191 NW 428, 31 ALR 46.

70. *Goodale v Murray*, 227 Iowa 843, 289 NW 450, 126 ALR 1121; *Griffith v Griffith*, 230 Neb

314, 431 NW2d 609; *Re Kaiser's Estate*, 150 Neb 295, 34 NW2d 366.

Where plaintiffs failed to make any reservations as to the admission of a police report into evidence, they were deemed to have waived their hearsay objection to its contents. *Aycock v Shreveport* (La App 2d Cir) 535 So 2d 1006, cert den (La) 536 So 2d 1223.

71. §§ 461 et seq.

72. *Tynes v Alabama G.S.R. Co.* (Ala App) 550 So 2d 427 (by implication); *Cohen v Cohen*, 11 Conn App 241, 527 A2d 245; *State v Barron* (Mo) 465 SW2d 523, 49 ALR3d 1176; *Re Kaiser's Estate*, 150 Neb 295, 34 NW2d 366.

73. *Lease Northwest, Inc. v Davis*, 224 Neb 617, 400 NW2d 220.

74. Practice References: 9 Federal Procedure, L Ed, Criminal Procedure § 22:818; 12 Federal Procedure, L Ed, Evidence § 33:22.

75. *State v Myers*, 117 Ariz 79, 570 P2d 1252, cert den 435 US 928, 55 L Ed 2d 524, 98 S Ct 1498; *Shelly v State*, 107 Ga App 736, 131 SE2d 135; *Greig v Griffel* (2d Dist) 49 Ill App 3d 829, 7 Ill Dec 499, 364 NE2d 660; *Redslob v Redslob* (Ind App) 433 NE2d 819; *Calder v Levi*, 168 Md 260, 177 A 392, 97 ALR 880.

As to the necessity of a formal exception, see § 485.

Annotations: Necessity and sufficiency of renewal of objection to, or offer of, evidence admitted or excluded conditionally, 88 ALR2d 12 § 6[d].

the objection must be repeated or it is waived.⁷⁶ although in some cases, renewal or a subsequent motion to strike has been deemed not to be essential.⁷⁷

If the court reserves its ruling on an objection until the argument of the case, if the objection is not renewed and the court's attention directed to it, the objection will be deemed waived.⁷⁸

Where a running or continuing objection is duly taken to the admission of a certain line of testimony, the party objecting is not required, in order to save the question for review, to object to each question thereafter asked the witness concerning the same matter covered by the objection already made.⁷⁹ But, an objection to the narration of merely preliminary matters or harmless details relating to a particular subject or transaction will not render unnecessary a further objection to evidence going to the substance of such transaction, under the rule stated.⁸⁰

§ 414. —Evidence conditionally admitted

Where evidence requiring connection is received conditionally under objection and exception, if the connection is not supplied, it is incumbent on the objecting party to apply to the court, either by motion or prayer, to exclude the evidence, and if he does not do so, he waives the lack of connection.⁸¹

It is the duty of the party seeking to exclude an exhibit, when the exhibit is admitted to the trial conditionally, to renew the objection and to move to strike, if its relevancy is not thereafter established.⁸²

76. *Arizona Binghampton Copper Co. v Dickson*, 22 Ariz 163, 195 P 538, 44 ALR 881; *People v Lawrence*, 143 Cal 148, 76 P 893; *Moore v State*, 140 Ga App 824, 232 SE2d 264; *Fenner & Beane v Nelson*, 64 Ga App 600, 13 SE2d 694; *Hays v Illinois Industrial Home for Blind*, 12 Ill 2d 625, 147 NE2d 287; *Palatine v Dahle*, 385 Ill 621, 53 NE2d 608; *Burger v Omaha & C.B.S.R. Co.*, 139 Iowa 645, 117 NW 35.

Annotations: 88 ALR2d 12 § 12[a].

77. *Clopton v Clopton*, 162 Cal 27, 121 P 720; *Johnson v Hanson*, 197 Minn 496, 267 NW 486.

Annotations: 88 ALR2d 12 § 12[b].

78. *Franks v State* (Ala App) 453 So 2d 1078; *Torres v State* (Alaska) 519 P2d 788; *Bridgeport Pipe Engineering Co. v De Matteo Constr. Co.*, 159 Conn 242, 268 A2d 391; *Hogan v City-County Hospital of La Grange*, 138 Ga App 906, 227 SE2d 796; *State ex rel. Symms v Collier*, 93 Idaho 19, 454 P2d 56; *Robbins v Midlothian* (1st Dist) 41 Ill App 3d 899, 354 NE2d 529; *Auto-Teria, Inc. v Ahern*, 170 Ind App 84, 352 NE2d 774, 20 UCCRS 336; *Reed v Burger*, 255 Iowa 322, 122 NW2d 290; *Kasten Constr. Co. v State Roads Com.*, 238 Md 38, 207 A2d 505; *Sudbury v Department of Public Utilities*, 351 Mass 214, 218 NE2d 415; *State ex rel. State Highway Com. v Kendrick* (Mo) 383 SW2d 740; *Butler v Crowe* (Mo App) 540 SW2d 940.

Annotations: 88 ALR2d 12 §§ 17, 19[a].

79. § 402.

80. *State v Eggleston*, 161 Wash 486, 297 P 162, 82 ALR 1439.

81. *Donahoo v State* (Ala App) 505 So 2d 1067, later app (Ala App) 552 So 2d 887; *Hunt v State*, 166 Ga App 524, 304 SE2d 576; *Trask v Kam*, 44 Hawaii 10, 352 P2d 320, 88 ALR2d 1, reh den 44 Hawaii 56, 352 P2d 328, 88 ALR2d 11; *Kloster v Markiewicz* (1st Dist) 94 Ill App 3d 392, 49 Ill Dec 966, 418 NE2d 986; *Flint & Walling Mfg. Co. v Beckett*, 167 Ind 491, 79 NE 503; *Redslob v Redslob* (Ind App) 433 NE2d 819; *Knickerbocker Ice Co. v Gardiner Dairy Co.*, 107 Md 556, 69 A 405; *Commonwealth v Tucker*, 189 Mass 457, 76 NE 127; *Menardi v Wacker*, 32 Nev 169, 105 P 287.

As to the conditional reception of evidence, generally, see § 324.

Annotations: Necessity and sufficiency of renewal of objection to, or offer of, evidence admitted or excluded conditionally, 88 ALR2d 12 §§ 4, 6[b].

82. *Woolwine v Furr's, Inc.* (App) 106 NM 492, 745 P2d 717.

As to introduction of documentary evidence, including exhibits, generally, see §§ 345 et seq.

■■■■ Observation: Where objection is made to evidence which may be admitted conditionally, the procedure includes the court's reserving its ruling on the objection, or admitting the evidence subject to a later motion to strike. Some judges, in admitting evidence conditionally over objection, make the evidence subject to a motion to strike, and state that the motion is considered already made; others require the objecting party to make the motion to strike later in the trial.⁸³

■■■■ Caution: Where a motion to strike is required, failure to make the motion may constitute a waiver of the objection to the evidence.⁸⁴

§ 415. Failure to object to evidence contradicting admissions

A party waives the right to rely upon an opponent's deemed admissions unless objection is made to the introduction of evidence contrary to those admissions.⁸⁵

Notwithstanding the effect of stipulation as binding judicial admissions dispensing with the necessity of legal proof, where the court makes findings of fact contrary to such stipulations and where ample evidence supports the court's findings, the parties who failed to object or to assert the stipulation in rebuttal to such evidence, have waived their right to rely on the stipulated facts.⁸⁶ Thus, a rule which gives conclusive effect to answers to requests for admissions does not obviate the requirement of contemporaneous objection to deposition statements and interrogatory answers and a party waives any binding and conclusive effect that such statements and answers, may have pursuant to such rule by failing to introduce the statements into evidence as responses to requests for admissions and by failing to object to the introduction of contrary testimony.⁸⁷

■■■■ Reminder: Evidence rules control the the admission or exclusion of evidence at trial.⁸⁸ Always consult current state statutes or court rules in the applicable jurisdiction. Each state's rules may have important differences imposed by statute, rule, or common law.⁸⁹

For discussion of motions to strike, generally, see §§ 461 et seq.

83. Practice References: Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 14:12.

84. *Ault v International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986; *Schwartz v Shapiro* (1st Dist) 229 Cal App 2d 238, 40 Cal Rptr 189; *McGee v State*, 121 Ga App 221, 173 SE2d 427.

Annotations: 88 ALR2d 12 § 13.

Practice References: Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 14:12.

85. *Marshall v Vise* (Tex) 767 SW2d 699, reh'g of cause overr (May 10, 1989) and on remand (Tex App Houston (1st Dist)) 1989 Tex App LEXIS 2922; *Collision Center Paint & Body, Inc. v Campbell* (Tex App Dallas) 773 SW2d 354; *TransiLift Equipment, Ltd. v Cunningham*, 234 Va 84, 360 SE2d 183.

A party relying on his opponent's pleadings as judicial admissions of fact, must protect his record by objecting to the introduction of evidence contrary to that admission of fact. *Escalona v Combs* (Tex App Houston (1st Dist)) 712 SW2d 822.

86. *Jones v Jefferson*, 91 NC App 289, 372 SE2d 80, 28 BNA WH Cas 1483, 110 CCH LC ¶ 35143, review den 324 NC 112, 377 SE2d 233.

87. *TransiLift Equipment, Ltd. v Cunningham*, 234 Va 84, 360 SE2d 183.

As to the necessity of contemporaneous objection, generally, see § 401.

88. As to the admission or exclusion of evidence, generally, see 29 Am Jur 2d, Evidence §§ 249 et seq.

89. Practice References: *Danner & Toothman, Trial Practice Checklists* (1989) § 8:70.

§ 416. Failure to object at prior trial

A waiver of objection to the competency of a witness or to the privilege of testimony is not confined to the trial in which the waiver occurs, but extends to a subsequent trial of the same case.⁹⁰ However, to the contrary, it also has been held that a waiver of objection to testimony or to the competency of a witness at a trial does not extend to a subsequent trial of the same case, and does not preclude the right to raise the objection at the later trial.⁹¹

Objections cannot be made to depositions on a subsequent trial which were not made on the first trial.⁹²

C. FAILURE TO SEEK LIMITING INSTRUCTION [§ 417]**§ 417. Generally**

Where a party does not request an instruction limiting the evidence to a specific purpose, even though such evidence is otherwise inadmissible, that party waives any complaint to the general admission of the evidence.⁹³ There is, however, no waiver of an objection by seeking an instruction which assumes the competency of the evidence where the requested instruction is refused.⁹⁴

d. OFFER OF EVIDENCE [§§ 418–421]**§ 418. Generally**

A party cannot complain of evidence which he himself has introduced or brought out.⁹⁵ Thus, by offering evidence, a party waives any objection to its competency as proof.⁹⁶

Where the court excludes evidence when offered but states that it may be offered later, failure to offer it again waives any error.⁹⁷

90. *Vattier v Hinde*, 32 US 252, 8 L Ed 675; *Billingsley v Gulick*, 256 Mich 606, 240 NW 46, 79 ALR 166.

91. *Maryland Casualty Co. v Maloney*, 119 Ark 434, 178 SW 387; *Burgess v Sims Drug Co.*, 114 Iowa 275, 86 NW 307; *State v Kelleher*, 224 Mo 145, 123 SW 551.

92. *Florence Oil & Refining Co. v Reeves*, 13 Colo App 95, 56 P 674.

Forms: Notice—Of intention to offer in evidence testimony given at former proceeding. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 74.

93. *Birchfield v Texarkana Memorial Hospital (Tex)* 747 SW2d 361, reh'g of cause overr (Apr 20, 1988) and (not followed by *De Leon v Louder (Tex App Amarillo)* 743 SW2d 357, writ den (Jun 15, 1988) and disapproved in, in part (Tex) 754 SW2d 148).

As to instructions limiting the use and the jury's consideration of evidence, generally, see §§ 1281 et seq.

94. *First State Bank v Kelly*, 30 ND 84, 152 NW 125.

95. *Tokar v Crestwood Imports, Inc. (1st Dist)*

177 Ill App 3d 422, 126 Ill Dec 697, 532 NE2d 382, 1989-1 CCH Trade Cases ¶ 68412, 8 UCCRS2d 682; *Romanek-Golub & Co. v Anvan Hotel Corp. (1st Dist)* 168 Ill App 3d 1031, 119 Ill Dec 482, 522 NE2d 1341; *State ex rel. State of Washington, Dept. of Social & Health Services v Dilworth*, 89 Or App 158, 747 P2d 387, review den 305 Or 433, 753 P2d 1380.

96. *Greenleaf's Lessee v Birth*, 30 US 132, 8 L Ed 72; *Goodale v Murray*, 227 Iowa 843, 289 NW 450, 126 ALR 1121; *State v Marshall*, 354 Mo 312, 189 SW2d 301; *State ex rel. State of Washington, Dept. of Social & Health Services v Dilworth*, 89 Or App 158, 747 P2d 387, review den 305 Or 433, 753 P2d 1380; *Rawle v McIlhenny*, 163 Va 735, 177 SE 214, 98 ALR 930.

97. *Franks v State (Ala App)* 453 So 2d 1078; *Bridgeport Pipe Engineering Co. v De Matteo Constr. Co.*, 159 Conn 242, 268 A2d 391; *Hogan v City-County Hospital of La Grange*, 138 Ga App 906, 227 SE2d 796; *Hong v Kong*, 5 Hawaii App 174, 683 P2d 833, reconsideration gr (Hawaii App) 753 P2d 253; *State ex rel. Symms v Collier*, 93 Idaho 19, 454 P2d 56;

■■■■ *Reminder:* Evidence rules control the the admission or exclusion of evidence at trial.⁹⁸ Always consult current state statutes or court rules in the applicable jurisdiction. Each state's rules may have important differences imposed by statute, rule, or common law.⁹⁹

§ 419. Evidence out of scope or order of examination

■■■■ *Caution:* The waiver doctrine may be applied to an inartful examination by counsel, as where counsel opens the door to privileged information, and the privilege is thereby waived.¹

Although where incompetent evidence has been admitted against objection and an exception has been taken, the objecting party may cross-examine upon or otherwise combat it without waiving his right to review,² a waiver may result from the eliciting of a repetition of the objectionable testimony on cross-examination,³ or from the eliciting of new matter relating to the transaction by extending the cross-examination beyond the scope of the direct examination.⁴

■■■■ *Observation:* In some federal courts, where a continuing objection need not be made to preserve the objection to subsequent evidence admitted within the scope of the court's first ruling, the cross-examination of a witness as to inadmissible evidence does not waive the vitality of the continuing objection, for the objecting party is entitled to rely on the court's ruling as the law of the case.⁵

A plaintiff who calls the defendant's expert as a witness in the case in chief, rather than waiting for the defendant to call the witness and then objecting at that time to the admission of testimony, waives any error in the testimony and may not complain on appeal that the defendant did not timely disclose its expert witness' identity, that the witness lacked the requisite expertise to testify, and that the testimony affected the trial result.⁶

Robbins v Midlothian (1st Dist) 41 Ill App 3d 899, 354 NE2d 529; Auto-Teria, Inc. v Ahern, 170 Ind App 84, 352 NE2d 774, 20 UCCRS 336; Kasten Constr. Co. v State Roads Com., 238 Md 38, 207 A2d 505; State ex rel. State Highway Com. v Kendrick (Mo) 383 SW2d 740; Moore Lumber Corp. v Walker, 110 Va 775, 67 SE 374.

Annotations: Necessity and sufficiency of renewal of objection to, or offer of, evidence admitted or excluded conditionally, 88 ALR2d 12 § 19[a].

98. As to the admission or exclusion of evidence, generally, see 29 Am Jur 2d, Evidence §§ 249 et seq.

99. **Practice References:** Danner & Toothman, Trial Practice Checklists (1989) § 8:70.

1. **Practice References:** Carlson, Successful Techniques for Civil Trial (1983) §§ 2:2, 2:29, 2:33.

2. § 420.

3. Nock v Fidelity & Deposit Co., 175 SC 188, 178 SE 839, 98 ALR 757.

Where an expert witness made a mathematical computation which he improperly described

as impairment of future earning capacity, notwithstanding the resulting speculation and confusion in the evidence, there was no error in permitting such testimony where the defendant waived its objection by cross-examination. Uryasz v Archbishop Bergan Mercy Hospital, 230 Neb 323, 431 NW2d 617.

4. Mollison v Rittgers, 140 Iowa 365, 118 NW 512.

5. 12 Federal Procedure, L Ed, Evidence § 33:23.

As to continuing objections, generally, see § 402.

6. Tokar v Crestwood Imports, Inc. (1st Dist) 177 Ill App 3d 422, 126 Ill Dec 697, 532 NE2d 382, 1989-1 CCH Trade Cases ¶ 68412, 8 UCCRS2d 682.

Where the state in affiliation proceeding, rather than objecting to evidence of the witness's relationship with the mother after the respondent presented it, instead called the witness in its own case in chief, notwithstanding a prior objection to the same evidence in a pre-trial proceeding, the state's tactical decision made the relationship an issue and constituted

§ 420. Evidence of similar or same character

Any objection to ordinarily inadmissible testimony, even a general objection,⁷ is waived if no objection is made when evidence of the same character⁸ or similar testimony is elicited.⁹ Thus, where incompetent evidence has been admitted over an objection and exception, the ground for appeal is waived if the party complaining subsequently permits, without objection, the introduction of evidence as to the same matter.¹⁰

If an objection to a competent question is sustained, there is no error in its exclusion where the same evidence is offered by the adverse party and is received.¹¹ Similarly, error resulting from the admission of evidence is waived by allowing similar evidence to be admitted without objection.¹² However, the fact that illegal testimony has been permitted to go to the jury without

a waiver of any claim of error about the pretrial denials. *State ex rel. State of Washington, Dept. of Social & Health Services v Dilworth*, 89 Or App 158, 747 P2d 387, review den 305 Or 433, 753 P2d 1380.

7. *State v Edwards*, 49 NC App 547, 272 SE2d 384.

As to the sufficiency of general objections, generally, see §§ 427 et seq.

8. *Gary Massey Chevrolet, Inc. v Ritch* (Fla App D1) 507 So 2d 713, 12 FLW 1276; *Boston Woven-Hose & Rubber Co. v Kendall*, 178 Mass 232, 59 NE 657; *Castle v Modern Farm Equipment Co.* (Mo App) 729 SW2d 650; *Polk v Biles*, 92 NC App 86, 373 SE2d 570, review den 324 NC 337, 378 SE2d 798; *State v Joyner*, 54 NC App 129, 282 SE2d 520, petition den 304 NC 730, 287 SE2d 903; *McCown v Muldrow*, 91 SC 523, 74 SE 386.

Where previous exhibits showing, in an action for damages and tort arising out of an automobile accident resulting in a fatality, the blood alcohol level of the decedent, had already been introduced into evidence, further objections to expert testimony with respect to the test resulting in such exhibits were waived. *McLaughlin v Fireman's Fund Ins. Co.* (La App 1st Cir) 549 So 2d 327.

9. *Bennette v Hader*, 337 Mo 977, 87 SW2d 413, 101 ALR 1190; *Castle v Modern Farm Equipment Co.* (Mo App) 729 SW2d 650; *Fabian v Fabian* (Tex App Austin) 765 SW2d 516; *Payne v Vinson* (Tex App Austin) 761 SW2d 474.

In an action alleging negligent operation of a tractor-trailer and negligent design, construction, and maintenance of the intersection at which a collision occurred resulting in the death of the plaintiff's decedent, the plaintiff could not object to the court's refusal to strike portions of affidavits by impartial eyewitnesses containing statements very similar to other statements made in an affidavit submitted by the investigating police officer, where those

statements were not challenged by the plaintiff. *Miller v Faulkner* (Ind App) 506 NE2d 52.

It was no abuse of discretion for the trial judge to allow the testimony of a witness as to his opinion that the plaintiff was entitled to a bonus, in an action by a salaried employee alleging breach of contract to pay him a bonus, where defense counsel allowed the witness to answer without objection at least two questions eliciting his opinion to the effect that the plaintiff was entitled to a bonus and only objected when, after such questions had been asked and answered, the witness was further asked what specific recommendations he would have made regarding the bonus. *McPeters v Yeargin Constr. Co.* (App) 290 SC 327, 350 SE2d 208.

The prior testimony of a state trooper, received without objection, that the plaintiff's failure to yield the right of way was a factor contributing to her accident, was not the equivalent of his later testimony that her failure to yield was a proximate cause of the accident, such to waive any objection thereto, since an act itself, though it gives rise to an accident or is one in a connected succession of events which leads to an accident, is not necessarily a proximate cause thereof. *De Leon v Louder* (Tex App Amarillo) 743 SW2d 357, writ den (Jun 15, 1988) and disapproved in, in part (Tex) 754 SW2d 148.

10. *Neuwelt v Roush*, 119 Ind App 481, 85 NE2d 506; *Wood v Kerr Dry Goods Co.*, 190 Okla 197, 121 P2d 992; *McCown v Muldrow*, 91 SC 523, 74 SE 386.

As to waiver of exception, generally, see § 489.

11. *Brown v Carolina M.R. Co.*, 67 SC 481, 46 SE 283.

12. *Tokar v Crestwood Imports, Inc.* (1st Dist) 177 Ill App 3d 422, 126 Ill Dec 697, 532 NE2d 382, 1989-1 CCH Trade Cases ¶68412, 8 UCCRS2d 682; *Rose v Tri-State Motor Transit Co.* (Mo App) 749 SW2d 723; *John Deere Co. v May* (Tex App Waco) 773 SW2d 369, CCH Prod Liab Rep ¶12271, writ den (Dec 13,

objection cannot be urged as a ground for allowing other testimony, inadmissible under particular rules of evidence, to be given when objection is made.¹³

Where the court has permitted a party to introduce inadmissible evidence, over objection and exception, the party injured thereby may, without waiving his rights, rebut such evidence with other evidence of the same character.¹⁴

§ 421. —Evidence contradicting admissions

Where a party to an action fails to object to testimony controverting a deemed admission and actually elicits much of the contradictory evidence, that party has waived his right to rely upon admissions controverted by testimony admitted at trial without objection.¹⁵ A party waives the right to rely upon an opponent's deemed admissions unless objection is made to the introduction of evidence contrary to those admissions.¹⁶

e. WITHDRAWAL OF OBJECTION [§ 422]

§ 422. Generally

■■■■ Observation: An express waiver occurs when counsel withdraws an objection.¹⁷

Where evidence is objected to, and the objection later is withdrawn, it is as if no objection had been made.¹⁸ The evidence may then be introduced, and any error of the trial court in previously excluding it is cured.¹⁹

Where a party objects to the introduction of evidence at the time that it is identified, but at the time that it is introduced and admitted into evidence by the court, that party states no objection, the prior objection is withdrawn or waived.²⁰ However, the withdrawal of an objection to the admissibility of certain evidence is not an admission of its legality or validity.²¹

1989) and reh'g of writ of error overr; *Fabian v Fabian* (Tex App Austin) 765 SW2d 516.

Error in admitting incompetent evidence is waived by subsequently admitting the fact which it is offered to establish. *Wicker v Jones*, 159 NC 102, 74 SE 801; *Cross v Houston B. & T.R. Co.* (Tex Civ App Houston (1st Dist)) 351 SW2d 84, 96 ALR2d 1, writ ref n r e (Jan 24, 1962).

13. *Lowery v Jones*, 219 Ala 201, 121 So 704, 64 ALR 553.

14. § 376.

15. *Marshall v Vise* (Tex) 767 SW2d 699, reh'g of cause overr (May 10, 1989) and on remand (Tex App Houston (1st Dist)) 1989 Tex App LEXIS 2922.

Plaintiffs, by failing to introduce into evidence admissions by the defendants and by eliciting testimony with respect thereto from the defendant for the first time during cross-examination, waived any binding and conclusive effect of defendant's pretrial admissions by failing to introduce the statements into evidence as responses to requests for such admis-

sions and by failing to object to the introduction of contrary testimony. *TransiLift Equipment, Ltd. v Cunningham*, 234 Va 84, 360 SE2d 183.

16. § 415.

17. **Practice References:** *Carlson, Successful Techniques for Civil Trial* (1983) §§ 2:2, 2:29, 2:33.

18. *Wilmington Housing Authority v Nos.* 312-314 East Eighth Street (Super) 55 Del 252, 191 A2d 5.

19. *Wilkinson v Service*, 249 Ill 146, 94 NE 50.

If the witness whose testimony was proffered subsequently is absent when an objection to his testimony is withdrawn, and if the facts to which he would testify are conceded, any error in previously excluding his testimony is cured. *Mason v State*, 74 Tex Crim 256, 168 SW 115.

20. *Heldman v Uniroyal, Inc.* (Cuyahoga Co) 53 Ohio App 2d 21, 7 Ohio Ops 3d 20, 371 NE2d 557.

21. 29 Am Jur 2d, Evidence § 615.

f. WITHDRAWAL OF EVIDENCE [§ 423]

§ 423. Generally

The withdrawal of evidence which has been offered constitutes a waiver of any error in rejecting it.²²

Evidence elicited on cross-examination rarely results in withdrawal from evidence of the opinion stated on direct examination.²³

4. SUFFICIENCY OF OBJECTION [§§ 424-435]

a. SPECIFICITY OF GROUNDS FOR OBJECTION [§§ 424-429]

§ 424. Requirement of specificity, generally

In general, a party opposing the introduction of evidence must state, on objecting to its introduction, the specific grounds for the objection²⁴ or no error is committed in overruling it.²⁵

■■■■ Observation: Where an objection is made to hypothetical question on the ground that it omits facts shown in evidence, counsel objecting has a duty to point out what specific matters are omitted from the question.²⁶

The matter objected to must be distinctly²⁷ and sharply brought to the court's attention.²⁸

Where evidence is apparently admissible for any purpose, or under any

22. *Gilchrist v Mystic Workers of World*, 188 Mich 466, 154 NW 575.

The withdrawal from the jury of evidence which was improperly admitted is no ground for error. *Specht v Howard*, 83 US 564, 21 L Ed 348.

23. *Stauffer Chemical Co. v Curry (Wyo)* 778 P2d 1083, 10 UCCRS2d 342.

24. *Maish v Arizona*, 164 US 599, 41 L Ed 567, 17 S Ct 193; *Holmes v Goldsmith*, 147 US 150, 37 L Ed 118, 13 S Ct 288; *Patrick v Graham*, 132 US 627, 33 L Ed 460, 10 S Ct 194; *Woods v Postal Telegraph-Cable Co.*, 205 Ala 236, 87 So 681, 27 ALR 834; *Smith v Menet* (2d Dist) 175 Ill App 3d 714, 125 Ill Dec 249, 530 NE2d 277, app den 124 Ill 2d 562, 129 Ill Dec 156, 535 NE2d 921; *Greig v Griffel* (2d Dist) 49 Ill App 3d 829, 7 Ill Dec 499, 364 NE2d 660; *Johnson v Jackson* (1st Dist) 43 Ill App 2d 251, 193 NE2d 485; *Moore v Clark* (La App 1st Cir) 517 So 2d 293; *Mahany v Kansas City R. Co. (Mo)* 254 SW 16, 29 ALR 817; *Crockett v Schlingman* (Mo App) 741 SW2d 717; *Mathis v Glover* (Mo App) 714 SW2d 222; *State ex rel. Human Services Dept. v Coleman* (App) 104 NM 500, 723 P2d 971; *Murray v Frick*, 277 Pa 190, 121 A 47, 29 ALR 74; *Roberts v Roberts*, 299 SC 315, 384 SE2d 719.

Whenever an objection to the admission of evidence is made, counsel is required to state the grounds upon which it is claimed or upon

which objection is made, succinctly and in such form as he desires it to go upon the record, before any discussion or argument is had. *Di Sorbo v Grand Associates One Ltd. Partnership*, 8 Conn App 203, 512 A2d 940.

In order to raise for review the question of the inadmissibility of evidence because of an alleged violation of a constitutional right, it is sufficient to call attention to the particular right alleged to have been infringed. *Hughes v State*, 145 Tenn 544, 238 SW 588, 20 ALR 639.

25. *Maish v Arizona*, 164 US 599, 41 L Ed 567, 17 S Ct 193; *Holmes v Goldsmith*, 147 US 150, 37 L Ed 118, 13 S Ct 288; *Woods v Postal Telegraph-Cable Co.*, 205 Ala 236, 87 So 681, 27 ALR 834; *Johnson v Jackson* (1st Dist) 43 Ill App 2d 251, 193 NE2d 485; *Mahany v Kansas City R. Co. (Mo)* 254 SW 16, 29 ALR 817; *Murray v Frick*, 277 Pa 190, 121 A 47, 29 ALR 74.

Where a general objection is overruled, and the evidence is received, the ruling will not be held erroneous unless there are some grounds which could not have been obviated had they been specified or the evidence in its essential nature is incompetent. *Wightman v Campbell*, 217 NY 479, 112 NE 184.

26. *Garst v Cullum*, 291 Ark 512, 726 SW2d 271; *Jines v Young* (Mo App) 732 SW2d 938.

27. *Buffalo Ins. Co. v Bommarito* (CA8 Mo) 42 F2d 53, 70 ALR 1211.

28. *Wheeler v Sedgwick*, 94 US 1, 24 L Ed 31.

circumstances, the court does not err in admitting it unless the reasons for its exclusion are given by the objecting party.²⁹

■■■ Observation: In some jurisdictions, on request, a party must state the grounds for his objection and inform the court of its actual basis; if a party chooses to state grounds in the absence of such a request from the court, he is bound thereby.³⁰

§ 425. —Purpose of specificity requirement

Because the purpose of a trial objection is to avoid error, an objection to a question should be specific enough to inform the trial court of the particular problem,³¹ so that the court can realize what rule of evidence is being invoked, and why that rule would exclude a responsive answer,³² and can then rule intelligently thereon,³³ and so that the party offering the testimony is given an opportunity to confront the objection.³⁴ Further, specific objections are required so that the trial judge will have a fair opportunity to correct any error in his charge before the jury begins its deliberations.³⁵ But all that is required of any objection to evidence is that the objection be sufficiently clear and definite so that the court will understand the reason for the objection and so that the basis of the objection is apparent to the trial court.³⁶ Thus, even if inartfully stated, the courts will allow an objection that apprises the trial court of the reason for the objection.³⁷

The mere statement of the trial judge that all rights on appeal will be protected, and that an exception will lie in the event a ruling on the admission of evidence should be adverse to either side, does not obviate the necessity of entering specific objections.³⁸

29. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273; *Western Union Tel. Co. v Wells*, 50 Fla 474, 39 So 838; *Smith v Leighton*, 38 Kan 544, 17 P 52; *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464.

30. *Crain v Dean* (Ky) 741 SW2d 655.

31. *Jones v Consolidation Coal Co.* (5th Dist) 174 Ill App 3d 38, 123 Ill Dec 649, 528 NE2d 33.

32. *Johnson v National Super Markets, Inc.* (Mo App) 752 SW2d 809; *Bailey v Valtec Hydraulics, Inc.* (Mo App) 748 SW2d 805; *United Cab Co. v Mason* (Tex App Houston (1st Dist)) 775 SW2d 783, writ den (Mar 7, 1990).

33. *Crain v Dean* (Ky) 741 SW2d 655; *Marois v Paper Converting Machine Co. (Me)* 539 A2d 621, CCH Prod Liab Rep ¶ 11696; *State ex rel. Human Services Dept. v Coleman* (App) 104 NM 500, 723 P2d 971; *United Cab Co. v Mason* (Tex App Houston (1st Dist)) 775 SW2d 783, writ den (Mar 7, 1990).

An objection to the use of rebuttal testimony on the ground that the evidence was "beyond the scope of permissible rebuttal," was overly broad and gave the trial court very little guidance. *Blakely v Bates* (Iowa) 394 NW2d 320.

34. *Jones v Consolidation Coal Co.* (5th Dist) 174 Ill App 3d 38, 123 Ill Dec 649, 528 NE2d 33.

A party objecting to the introduction of certain evidence must specify the particular objection to all instances in which the objection might be corrected by the adverse party. *Greig v Griffel* (2d Dist) 49 Ill App 3d 829, 7 Ill Dec 499, 364 NE2d 660.

35. *Schoonmaker v Capital Towing Co.* (La App 1st Cir) 512 So 2d 480, cert den (La) 514 So 2d 458.

As to instructions to the jury, generally, see §§ 1077 et seq.

36. *Williams v Bailey* (Mo App) 759 SW2d 394.

37. *Malcolm v State* (Fla App D3) 415 So 2d 891; *O'Leary v Shipley*, 313 Md 189, 545 A2d 17, 3 BNA IER Cas 1517; *United Cab Co. v Mason* (Tex App Houston (1st Dist)) 775 SW2d 783, writ den (Mar 7, 1990).

38. *Mains v K Mart Corp.* (App) 297 SC 142, 375 SE2d 311.

As to the necessity of a formal exception, generally, see § 485.

§ 426. —Statement of multiple grounds; waiver of unspecified grounds

Where evidence is objectionable on more than one ground, it is sufficient if one ground is stated,³⁹ but, an objection to evidence based on a specific ground constitutes a waiver of objections on all grounds not so specified.⁴⁰ Similarly, where reasons are specified in a motion to exclude testimony, other reasons not specified are waived.⁴¹ Thus, where evidence is admissible on any one ground, objections on other grounds are not sufficient.⁴²

Practice guide: An objection does not lose specificity by combining several grounds, but dual or multiple grounds should be separated by a clearly stated conjunctive, for instance, “. . . and is further objectionable because . . .”⁴³

§ 427. General objections

Definition: A general objection is one that does not clearly assign some rule of evidence as a basis for exclusion.⁴⁴

General objections voice an objection without specifying a particular basis therefor.⁴⁵ Thus, a general objection is ordinarily regarded to be unavailing,⁴⁶ unless the evidence is clearly inadmissible for any purpose or the only possible ground of objection thereto is obvious,⁴⁷ the portion of the evidence objected to is clearly pointed out, and its illegality is apparent on its face,⁴⁸ or the record affirmatively shows that the court was aware of the portion of the

39. *Carver v United States*, 160 US 553, 40 L Ed 532, 16 S Ct 388, later app 164 US 694, 41 L Ed 602, 17 S Ct 228 (improper rebuttal testimony for which a proper foundation has not been laid is sufficiently objected to by the statement that no foundation therefor has been laid, without challenging it on the ground that it is not proper in rebuttal).

40. *Jones v Consolidation Coal Co.* (5th Dist) 174 Ill App 3d 38, 123 Ill Dec 649, 528 NE2d 33; *In Interest of Davis*, 377 Pa Super 46, 546 A2d 1149, app gr 521 Pa 609, 557 A2d 341 and affd (Pa) 586 A2d 914.

Where defendants objected to plaintiffs' statement for introducing insurance into the trial, but did not object that the plaintiff violated a specific rule, the defendants' objection preserved the issue of insurance for review, but waived any objection to the violation of the rule. *United Cab Co. v Mason* (Tex App Houston (1st Dist)) 775 SW2d 783, writ den (Mar 7, 1990).

41. *St. Louis, I.M. & S.R. Co. v Blaylock*, 117 Ark 504, 175 SW 1170.

42. *Miller v Journal Co.*, 246 Mo 722, 152 SW 40; *Parsons v New York C. & H.R.R. Co.*, 113 NY 355, 21 NE 145.

43. **Practice References:** Carlson, *Successful Techniques for Civil Trial* (1983), § 2:28.

44. **Practice References:** Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19.4.

45. *State ex rel. Human Services Dept. v Coleman* (App) 104 NM 500, 723 P2d 971.

46. *St. Joseph Stock Yards Co. v United States*, 298 US 38, 80 L Ed 1033, 56 S Ct 720; *Choctaw, O. & G.R. Co. v McDade*, 191 US 64, 48 L Ed 96, 24 S Ct 24; *Boston & A.R. Co. v O'Reilly*, 158 US 334, 39 L Ed 1006, 15 S Ct 830; *Toplitz v Hedden*, 146 US 252, 36 L Ed 961, 13 S Ct 70; *District of Columbia v Woodbury*, 136 US 450, 34 L Ed 472, 10 S Ct 990; *Patrick v Graham*, 132 US 627, 33 L Ed 460, 10 S Ct 194; *Matthews v United States* (CA5 Ga) 217 F2d 409, 50 ALR2d 1187; *Alabama Power Co. v Thompson*, 250 Ala 7, 32 So 2d 795, 9 ALR2d 974; *Crockett v Schlingman* (Mo App) 741 SW2d 717; *State v Jeffries*, 55 NC App 269, 285 SE2d 307, app dismd 305 NC 398, 290 SE2d 367.

47. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273; *Mills v Texas Compensation Ins. Co.* (CA5 Tex) 220 F2d 942; *Alabama Power Co. v Thompson*, 250 Ala 7, 32 So 2d 795, 9 ALR2d 974; *Scott v Times-Mirror Co.*, 181 Cal 345, 184 P 672, 12 ALR 1007; *Eachus v Los Angeles C.E.R. Co.*, 103 Cal 614, 37 P 750; *State ex rel. State Highway Com. v Rauscher Chevrolet Co.* (Mo) 291 SW2d 89, 55 ALR2d 773; *Hungate v Hudson*, 353 Mo 944, 185 SW2d 646, 157 ALR 598; *Wightman v Campbell*, 217 NY 479, 112 NE 184.

48. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273; *Wright v United States*, 53

evidence objected to.⁴⁹ The whole of the evidence offered may be admitted if any part is admissible, where an objection is interposed generally, without pointing out a particular objectionable item.⁵⁰ But, where the ground of objection is one which could not be obviated if specifically pointed out, a general objection is sufficient.⁵¹

Caution: General objections are relatively unpersuasive and may result in an issue not being preserved on appeal.⁵²

Recommendation: The better practice in lodging an objection to the introduction of evidence is, rather than to rely on a general objection, to state specifically the reason for the objection, thereby waiving all other reasons for excluding the evidence.⁵³

Even when a general objection is sufficient, its benefit is lost when substantially the same evidence is thereafter admitted without renewed objection.⁵⁴

§ 428. —Objection to incompetent, irrelevant, and immaterial evidence

Observation: The most common examples of a general objection are objections stating that the evidence is incompetent and irrelevant.⁵⁵

An objection that evidence is “incompetent,” “irrelevant,” or “immaterial” is ordinarily regarded in most jurisdictions, in the absence of any statutory provision to the contrary, as not sufficiently definite to present any question for review,⁵⁶ unless it is obvious from the question itself that the evidence is

App DC 74, 288 F 428; *Lundberg v Baumgartner*, 5 Wash 2d 619, 106 P2d 566.

49. *Carson v Metropolitan Life Ins. Co.*, 156 Ohio St 104, 45 Ohio Ops 103, 100 NE2d 197, 28 ALR2d 344.

In a proceeding to review the probationary status of a juvenile because of problems in the home, where the court revoked probation and ordered the juvenile committed based on his probation officer's testimony, over objection, the objection, although general, was adequate to preserve the court's evidentiary ruling for appellate review. *In Interest of Davis*, 377 Pa Super 46, 546 A2d 1149, app gr 521 Pa 609, 557 A2d 341 and affd (Pa) 586 A2d 914.

50. § 430.

51. *Scott v Times-Mirror Co.*, 181 Cal 345, 184 P 672, 12 ALR 1007; *Oregon R. & N. Co. v Eastlack*, 54 Or 196, 102 P 1011.

52. **Practice References:** *Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19.4.

53. *In Interest of Davis*, 377 Pa Super 46, 546 A2d 1149, app gr 521 Pa 609, 557 A2d 341 and affd (Pa) 586 A2d 914.

Defendant waived objection to the qualifications of a deputy sheriff to testify that he checked the brakes on defendant's car and they worked properly, where defendant interposed only a general objection and did not object on the ground that the witness had not been

qualified as an expert. *State v Edwards*, 49 NC App 547, 272 SE2d 384.

54. § 420.

55. **Practice References:** *Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19.4.

56. *Mills v Texas Compensation Ins. Co.* (CA5 Tex) 220 F2d 942; *People v Wright*, 26 Cal App 2d 197, 79 P2d 102; *Hungate v Hudson*, 353 Mo 944, 185 SW2d 646, 157 ALR 598.

Where the defendant, in a negligence and strict products liability action resulting from injury to a machine operator, objected to evidence of prior occurrences on the ground of relevancy, the failure of the defendant to make a contemporaneous objection that would apprise the court and the plaintiff of the precise ground of the objection precluded the defendant's claim of error on appeal. *Marois v Paper Converting Machine Co. (Me)* 539 A2d 621, CCH Prod Liab Rep ¶ 11696.

A bare objection to evidence on the ground of relevancy and the materiality is too general to preserve the trial court's ruling for appellate review. *Bailey v Valtec Hydraulics, Inc. (Mo App)* 748 SW2d 805.

Where a party sought to admit into evidence letters, medical records, a case file, and a hospital handbook on birth registration, the objection by opposing counsel to the “blanket intro-

wholly incompetent and inadmissible for any purpose.⁵⁷ An objection to a question as "incompetent, irrelevant, and immaterial" conveys neither to the court nor to counsel any specific information as to the real point of objection.⁵⁸

Sometimes such an objection is sufficient⁵⁹ by virtue of statutory provision, in the absence of a request by the court or opposing counsel for a statement of the particular grounds of, or reasons for, the objection.⁶⁰ Where specific objections have been interposed to a general line of testimony, an objection to one of the series of questions as incompetent, irrelevant, and immaterial cannot be disregarded, for the objections already made will be deemed to put the court on notice as to the real objection.⁶¹

§ 429. Effect of specificity on appeal

An objection that lacks specificity is insufficient to present and preserve the error,⁶² and an appellate court will not reverse a ruling of the trial court unless the specific objection relied upon was presented to that court for consideration.⁶³ Thus, general objections are not favored on appeal.⁶⁴ A general objection ordinarily waives its appellate review while, on the other hand, a specific objection is normally a condition precedent to appellate review.⁶⁵ Further, where only a general objection is made, the admission of the evidence is not ground for reversal if it is proper for any purpose.⁶⁶

On appeal, the party will be limited, ordinarily, to the specific objections to evidence made at the trial,⁶⁷ and the appellate court will consider only such

duction of the exhibit, on the ground that it was irrelevant and immaterial," was not a specific objection or any objection directed to any particular part of the exhibit and so was properly overruled by the court. *Crockett v Schlingman* (Mo App) 741 SW2d 717.

57. § 427.

58. *Heok v Allendale Tp.*, 161 Mich 567, 126 NW 987; *State v Von Klein*, 71 Or 159, 142 P 549 (superseded on other grounds by statute as stated in *State v Moen*, 309 Or 45, 786 P2d 111); *H.C. Behrens Lumber Co. v Lager*, 26 SD 160, 128 NW 698.

59. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273 (objection to admission of a co-defendants' confession).

60. *Gilbert v Citizens' Nat. Bank*, 61 Okla 112, 160 P 635.

61. *Re Eysaman's Will*, 113 NY 62, 20 NE 613.

As to running or continuing objections, see § 402.

62. *United States v McMasters*, 71 US 680, 18 L Ed 311; *McAfee v Crofford*, 54 US 447, 14 L Ed 217; *Kelly v Jackson*, 31 US 622, 8 L Ed 523; *Re Estate of Palamara* (Ind App) 513 NE2d 1223; *Moore v Clark* (La App 1st Cir) 517 So 2d 293; *Schoonmaker v Capital Towing Co.* (La App 1st Cir) 512 So 2d 480, cert den (La) 514 So 2d 458; *Irving v Goodimate Co.*,

320 Mass 454, 70 NE2d 414, 171 ALR 326; *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464; *Johnson v National Super Markets, Inc.* (Mo App) 752 SW2d 809; *Jines v Young* (Mo App) 732 SW2d 938; *White v Southern R. Co.*, 142 SC 284, 140 SE 560, 57 ALR 634; *McKamey v Andrews*, 40 Tenn App 112, 289 SW2d 704; *State v Gillies*, 40 Utah 541, 123 P 93.

63. *Re Estate of Palamara* (Ind App) 513 NE2d 1223.

64. *State ex rel. Human Services Dept. v Coleman* (App) 104 NM 500, 723 P2d 971.

65. *Re Powers* (Ala App) 523 So 2d 1079.

66. *Mississippi Mills Co. v Smith*, 69 Miss 299, 11 So 26; *In Interest of Davis*, 377 Pa Super 46, 546 A2d 1149, app gr 521 Pa 609, 557 A2d 341 and affd (Pa) 586 A2d 914; *Comstock's Adm'r v Jacobs*, 89 Vt 133, 94 A 497.

Since copies of documents are admissible under some circumstances, a general objection to their admission does not raise the question whether or not they constitute the best evidence. *People v Elliott*, 272 Ill 592, 112 NE 300; *Smith v Leighton*, 38 Kan 544, 17 P 52.

67. *Tevis v Ryan*, 233 US 273, 58 L Ed 957, 34 S Ct 481; *Boston & A.R. Co. v O'Reilly*, 158 US 334, 39 L Ed 1006, 15 S Ct 830; *Stebbins v Duncan*, 108 US 32, 27 L Ed 641, 2 S Ct 313; *Belk v Meagher*, 104 US 279, 26 L Ed 735;

grounds of objection as are specified.⁶⁸ In other words, an appellant is confined to the specific objections made by him and can have the benefit of no others.⁶⁹

■■■■ Observation: The manner of raising and reserving questions for review is in some instances prescribed by statute, and where such is the case, compliance with the provisions thereof is ordinarily a condition precedent to the right of review.⁷⁰

b. OBJECTIONS SEEKING LIMITED USE OF EVIDENCE [§§ 430-435]

§ 430. Evidence admissible in part, generally

The court is not required to explain the limited admissibility of the evidence,⁷¹ and unless restricted when introduced, evidence admissible on one issue is thereafter competent generally.⁷²

§ 431. —Limitation on proffer by proponent or opponent

When evidence that is apparently inadmissible is offered for a limited purpose for which it is admissible, the proponent of the evidence has the burden of making clear to the court his reason for the offer and the court is entitled to be advised of this fact before ruling on the offer.⁷³

Once evidence inadmissible in part is admitted, the burden is on the party desiring a limiting instruction to request it.⁷⁴ Thus, where evidence, otherwise

Pioneer Constructors v Symes, 77 Ariz 107, 267 P2d 740, 41 ALR2d 668; *Moore v Clark* (La App 1st Cir) 517 So 2d 293; *Kagan v Levenson*, 334 Mass 100, 134 NE2d 415, 62 ALR2d 704; *Yuin v Hilton*, 165 Ohio St 164, 59 Ohio Ops 219, 134 NE2d 719, 57 ALR2d 681.

As to waiver of unspecified grounds, see § 426.

For discussion of waiver of grounds to object to the admission of evidence, generally, see §§ 472 et seq.

68. *Pennsylvania R. Co. v Minds*, 250 US 368, 63 L Ed 1039, 39 S Ct 531; *Pioneer Constructors v Symes*, 77 Ariz 107, 267 P2d 740, 41 ALR2d 668; *Davidson v McKown*, 157 Kan 217, 139 P2d 421, 6 ALR2d 1; *Marcuse v Broad-Grace Arcade Corp.*, 164 Va 553, 180 SE 327, 101 ALR 217.

69. *Stebbins v Duncan*, 108 US 32, 27 L Ed 641, 2 S Ct 313; *Wood v Weimar*, 104 US 786, 26 L Ed 779; *Burton v Driggs*, 87 US 125, 22 L Ed 299; *W.P. Brown & Sons Lumber Co. v Rattray*, 238 Ala 406, 192 So 851, 129 ALR 526; *Automobile Underwriters v Camp*, 217 Ind 328, 27 NE2d 370, 128 ALR 1024, reh den 217 Ind 342, 28 NE2d 68, 128 ALR 1031 (ovrld by State ex rel. *Travelers Ins. Co. v Madison Superior Court*, 265 Ind 287, 354 NE2d 188); *State v Patchett*, 203 Kan 642, 455 P2d 580.

70. *Re Wilson*, 140 US 575, 35 L Ed 513, 11 S Ct 870.

71. *Board of Transp. v Eastern Developers & Rentals, Inc.*, 28 NC App 114, 220 SE2d 198.

When an offer of evidence is made, some of which is admissible and some of which is inadmissible, it is not the responsibility of the trial judge to separate the admissible from the inadmissible evidence and in the absence of an appropriately-limited offer by the proponent of the evidence, the trial judge's ruling excluding the evidence will be upheld on appeal. *Donavant v Hudspeth*, 318 NC 1, 347 SE2d 797.

72. *Diaz v United States*, 223 US 442, 56 L Ed 500, 32 S Ct 250; *First Nat. Bank v Union Hospital of Fall River*, 281 Mass 64, 183 NE 247, 89 ALR 1125; *Parker v Atlantic C.L.R. Co.*, 133 NC 335, 45 SE 658.

Where objectionable evidence is separable from the unobjectionable, an objection to evidence in its entirety ordinarily will be overruled where part of the evidence offered is admissible. *Cherokee Water Co. v Gregg County Appraisal Dist.* (Tex App Tyler) 773 SW2d 949, writ granted (Tex) 33 Tex Sup Ct Jour 322 and affd (Tex) 801 SW2d 872.

73. *Kaarup v Schmitz, Kalda & Associates* (SD) 436 NW2d 845.

74. *Aspiazu v Orgera*, 205 Conn 623, 535 A2d 338 (by implication); *Bonelli v Volkswagen of America, Inc.*, 166 Mich App 483, 421 NW2d 213, app den 430 Mich 896, reconsideration den 432 Mich 872.

admissible, is incompetent in part, the opposing party is entitled upon proper objection and request to have such evidence limited and restricted.⁷⁵

Where a party does not make known to the court the limited purpose of an offer of proof of evidence otherwise excludible as inadmissible, the trial court's ruling excluding the testimony is not reviewable.⁷⁶ Even valid objections may be, and usually are waived in the ordinary case by failure to follow the recognized practice by a motion to limit if the evidence is not competent.⁷⁷

§ 432. —Requisite degree of specificity

If objection is interposed generally, where the evidence consists of several distinct parts, some of which are competent and admissible, without pointing out the particular material which is objectionable, the whole of the evidence offered may be admitted.⁷⁸ General objections are insufficient where the evidence consists of several distinct parts, some of which are competent and others not.⁷⁹ This rule prevents trial judges from being misled or entrapped by having their attention directed, under a general objection, to one point, and their judgments reversed on another, when the objection to that point might have been readily sustained in the first instance.⁸⁰ Thus, where evidence offered by one party consists of several statements,⁸¹ or items, some of which are objectionable, the adverse party in taking objection should specify the objectionable material.⁸² For instance, when documentary evidence is admitted

In a criminal prosecution for rape, although objection was made and sustained to the introduction in evidence of a knife, where no objection was interposed to any testimony or comment concerning the knife, and where the fact, that the knife found on the defendant, was already in evidence without objection, remarks and reference to the knife could not be said to have a natural tendency to influence the jury or prejudice the defendant such to constitute reversible error. *Gulley v State* (Ala App) 342 So 2d 1362.

75. *State v Pope*, 24 NC App 644, 211 SE2d 841, affd 287 NC 505, 215 SE2d 139.

As to cautionary instructions limiting the use and the jury's consideration of evidence, generally, see §§ 1281 et seq.

76. *Kaarup v Schmitz, Kalda & Associates* (SD) 436 NW2d 845.

77. *State v Beam*, 45 NC App 82, 262 SE2d 350.

78. *Southern P. Co. v Schoer* (CA8 Utah) 114 F 466; *Allen v St. Louis Public Service Co.*, 365 Mo 677, 285 SW2d 663, 55 ALR2d 1022; *Crockett v Schlingman* (Mo App) 741 SW2d 717; *Rob-Lee Corp. v Cushman* (Mo App) 727 SW2d 455; *State v Marchand*, 31 NJ 223, 156 A2d 245, 87 ALR2d 883; *Timberman v State*, 107 Ohio St 261, 1 Ohio L Abs 276, 1 Ohio L Abs 844, 140 NE 753; *Spearman v State*, 68 Tex Crim 449, 152 SW 915.

The trial court did not err in the admission of a sheriff's testimony, including prior incon-

sistent statements made by a state's witness which constituted impeachment by the state of its own witness, where defendant objected to the sheriff's entire testimony and part of the testimony was competent. *State v Pope*, 24 NC App 644, 211 SE2d 841, affd 287 NC 505, 215 SE2d 139.

79. *Armstrong v Vallion*, 187 Ga App 380, 370 SE2d 215 (where some portions of an approximately 160-page hospital record were admissible, trial court did not err in admitting the whole hospital record into evidence over plaintiff's general objection to the record in total); *State v Pope*, 24 NC App 644, 211 SE2d 841, affd 287 NC 505, 215 SE2d 139.

80. *United States v McMasters*, 71 US 680, 18 L Ed 311; *Moore v Bank of Metropolis*, 38 US 302, 10 L Ed 172; *Timberman v State*, 107 Ohio St 261, 1 Ohio L Abs 276, 1 Ohio L Abs 844, 140 NE 753.

81. *Aspiazu v Orgera*, 205 Conn 623, 535 A2d 338; *State v Pope*, 24 NC App 644, 211 SE2d 841, affd 287 NC 505, 215 SE2d 139.

82. *Aspiazu v Orgera*, 205 Conn 623, 535 A2d 338; *Crockett v Schlingman* (Mo App) 741 SW2d 717; *State v Pope*, 24 NC App 644, 211 SE2d 841, affd 287 NC 505, 215 SE2d 139; *State v Lasecki*, 90 Ohio St 10, 106 NE 660; *United Cab Co. v Mason* (Tex App Houston (1st Dist)) 775 SW2d 783, writ den (Mar 7, 1990).

In a worker's compensation case in which the defense sought admission into evidence of the

into evidence, the entire contents of the document are admitted, absent specific objections to admission on a partial basis.⁸³ On the other hand, it has been held that a defendant's general objection to the admission of documentary evidence should have been sustained, notwithstanding the objection could have been more specific in delineating the grounds upon which the documents ultimately would be inadmissible, since the trial court likewise might have clarified the record by inquiring as to the basis for the objection.⁸⁴

§ 433. Evidence admissible for specific purpose

Evidence may be admissible for one purpose but inadmissible for another, and in such a case, the objection to the admission of the evidence should be directed against its use for the inadmissible purpose.⁸⁵ Testimony which is confident for one purpose should not generally be excluded because it is incompetent for another purpose.⁸⁶ Even though evidence is refused one time or on one basis, that determination does not require that the evidence be foreclosed from admission at another time or under other circumstances.⁸⁷

Where evidence is necessary for some permissible purpose, and the object is not provable by some other available means, it is not error to allow otherwise inadmissible evidence for a specific purpose.⁸⁸ If evidence offered is admissible for a specific purpose, it should be admitted with a limiting instruction,⁸⁹ and

complete medical records of the claimant, the trial court committed prejudicial error in ruling that all of the records were admissible, where counsel for the employee had objected to the hearsay opinion. *Hurtado v Texas Employers' Ins. Assn.* (Tex) 574 SW2d 536, reh overr (Dec 20, 1978).

As to various factors considered by a court in limiting the use of evidence, generally, including its nature and effect, see §§ 336 et seq.

83. *Armstrong v Vallion*, 187 Ga App 380, 370 SE2d 215; *Allen v St. Louis Public Service Co.*, 365 Mo 677, 285 SW2d 663, 55 ALR2d 1022; *Crockett v Schlingman* (Mo App) 741 SW2d 717 (if any part of an exhibit introduced into evidence is admissible, a blanket objection to the entire exhibit is properly overruled); *Rob-Lee Corp. v Cushman* (Mo App) 727 SW2d 455; *State v Marchand*, 31 NJ 223, 156 A2d 245, 87 ALR2d 883.

Where defendant made an initial objection to the admission of the report as a whole, the trial court properly indicated it would admit the report but that it would consider any specific objections the defendant raised to specific portions of it. *Aspiazu v Orgera*, 205 Conn 623, 535 A2d 338.

84. *Cincinnati Ins. Co. v Volkswagen of America, Inc.* (Franklin Co) 41 Ohio App 3d 239, 535 NE2d 702, motion overr.

As to introduction of documentary evidence, generally, see §§ 345 et seq.

85. *United States v McMasters*, 71 US 680, 18 L Ed 311; *McAfee v Crofford*, 54 US 447, 14 L Ed 217; *Kelly v Jackson*, 31 US 622, 8 L Ed 523; *Irving v Goodimate Co.*, 320 Mass 454, 70 NE2d 414, 171 ALR 326; *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464; *White v Southern R. Co.*, 142 SC 284, 140 SE 560, 57 ALR 634.

As to limiting the offer to a particular purpose, generally, see 29 Am Jur 2d, Evidence § 266.

86. *Bonelli v Volkswagen of America, Inc.*, 166 Mich App 483, 421 NW2d 213, app den 430 Mich 896, reconsideration den 432 Mich 872.

87. *Stauffer Chemical Co. v Curry* (Wyo) 778 P2d 1083, 10 UCCRS2d 342.

In a criminal prosecution, a witness may be called to testify for the state on rebuttal, notwithstanding that earlier his testimony was ruled inadmissible when offered by the defense, where the testimony was necessary and relevant to rebut negative inferences raised by the defendant, since a witness is not permanently disqualified to testify for one party simply because his testimony has been previously ruled inadmissible when presented by the other party. *State v Cody*, 40 NC App 735, 253 SE2d 642.

88. *Holbrook Contracting, Inc. v Tyner*, 181 Ga App 838, 354 SE2d 22.

89. § 434.

an objection to its admission should be overruled, even though such evidence is not admissible generally.⁹⁰

Where evidence is offered for a purpose for which it is inadmissible, it is not error to exclude it although it might be admissible for another purpose.⁹¹

§ 434. —Necessity of limiting instruction

When evidence, competent for some purposes but incompetent for others, is offered for a purpose for which it is competent,⁹² it should, upon proper objection being made, be admitted with direction from the trial judge to the jury as to how it is to be applied, on what issue or issues it is to be considered, and on what it is not to be considered.⁹³ The party desiring the court to limit the purpose for which such evidence may be used should request an instruction to that end.⁹⁴ In such case, when proper objection is made, such evidence cannot properly be considered for any other purpose.⁹⁵

Unless a request for an instruction limiting the use of the evidence is made, it is before the jury as evidence generally.⁹⁶ Counsel who fails to seek such a limiting instruction may not complain because opposing counsel, in argument to the jury, lays undue emphasis on the evidence as showing the facts which it is inadmissible to prove.⁹⁷ On the other hand, when evidence is offered for two purposes, and it is admissible for one purpose but not for the other, the exclusion of such evidence is not error where the proponent of the evidence does not limit its offer for the admissible purpose only.⁹⁸

§ 435. Evidence admissible against some parties

When evidence is admissible against one party but not another, the trial

90. *Southern P. Co. v Schoer* (CA8 Utah) 114 F 466; *Lejeune v General Petroleum Corp.*, 128 Cal App 404, 18 P2d 429; *Curtin v Benjamin*, 305 Mass 489, 26 NE2d 354, 129 ALR 433; *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464.

The trial court did not err in allowing the jury, in an action to recover damages for the death of a former railway employee, to view a videotape, which was offered and admitted for the sole purpose of illustrating a work crew unloading a train under conditions allegedly dissimilar to those prevailing on the day the plaintiff's husband died, where the jury was fully advised of the limited purpose for which the evidence was admitted and also of the applicable differences in temperature, terrain, and other factors. *Adams v Southern R. Co.*, 180 Ga App 578, 349 SE2d 809.

91. *Philadelphia & T.R. Co. v Stimpson*, 39 US 448, 10 L Ed 535; *Roberts v Roberts*, 168 Cal 307, 142 P 1080.

92. 29 Am Jur 2d, Evidence §§ 262, 263.

93. *Howard v State*, 172 Ala 402, 55 So 255; *State v Dolbow*, 117 NJL 560, 189 A 915, 109 ALR 1488, app dismd 301 US 669, 81 L Ed 1334, 57 S Ct 943; *Findlay Brewing Co. v Bauer*, 50 Ohio St 560, 35 NE 55.

Forms: Evidence admitted for limited purpose

to be considered by jury for such purpose only. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 160.

94. § 1283.

95. *Schworm v Fraternal Bankers' Reserve Soc.*, 168 Iowa 579, 150 NW 714.

96. *Allen v Lindeman*, 259 Iowa 1384, 148 NW2d 610; *First Nat. Bank v Union Hospital of Fall River*, 281 Mass 64, 183 NE 247, 89 ALR 1125; *Murray v Frick*, 277 Pa 190, 121 A 47, 29 ALR 74.

While questions pertaining to matters of substantive right are ordinarily raised by the pleadings, they may, in some instances, be sufficiently raised, for the purpose of consideration on appeal or review, by other methods, such as the introduction of evidence. *Crayton v Larabee*, 220 NY 493, 116 NE 355.

97. *Spicer v Spicer*, 249 Mo 582, 155 SW 832.

Where the plaintiff did not except to the failure to limit testimony, and it did not appear what use was made of the testimony in argument, it will be presumed that the only use made of it was legitimate. *McCarthy's Adm'r v Northfield*, 89 Vt 99, 94 A 298.

98. *Worldwide Anesthesia Associates, Inc. v Bryan Anesthesia, Inc.* (Tex App Houston (14th Dist)) 765 SW2d 445.

court may admit the evidence within an instruction to the jury that it should consider the evidence only as it applies to the party against whom it is properly admissible.⁹⁹ Where there are several parties, or where several cases are tried together, and evidence is offered which is competent as to one or more parties or cases and not competent as to others, a party desiring a limitation to be imposed upon the application of the evidence to the issues must raise the point specifically.¹ If the defendants are not jointly represented by counsel, but two or more firms are separately representing separate defendants so that such a ruling would be an abridgment of the right of one or more defendants, this should be called to the court's attention at the time; otherwise, the objection is waived.² But, the courts on appeal have in several cases reversed the judgment under a general objection where the evidence was clearly inadmissible as to one defendant, and the inadmissibility appeared on the face of the question itself, or where, without such evidence, there would not be sufficient ground to sustain a verdict as to one of the defendants.³ The fact that the objection to evidence is made in the name of two defendants jointly indicted and jointly tried does not justify the court in overruling it as to both, where the evidence is obviously incompetent against one.⁴

5. OFFER OF PROOF [§§ 436-460]

a. PURPOSE OF OFFER [§§ 436-439]

§ 436. Generally; basis for ruling of trial court

Fundamental principles of evidentiary procedure dictate that evidence must be offered before an opposing party may object to its introduction or before its admissibility may be ruled upon by a trial court judge.⁵

An offer of proof is intended to inform the trial court of the legal theory under which the proffered evidence is admissible, of the specific nature of its admissibility,⁶ of the nature and substance of the evidence offered,⁷ and, generally, of what the party making the proffer intends to prove, so that the

99. *Bonelli v Volkswagen of America, Inc.*, 166 Mich App 483, 421 NW2d 213, app den 430 Mich 896, reconsideration den 432 Mich 872.

1. *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464; *McKamey v Andrews*, 40 Tenn App 112, 289 SW2d 704; *State v Gillies*, 40 Utah 541, 123 P 93.

For discussion of the admissibility of confessions implicating, or exonerating, codefendants, see 29 Am Jur 2d, Evidence §§ 539, 540.

2. *Archer v Gwinnett County*, 110 Ga App 442, 138 SE2d 895; *People v Lewis*, 6 Mich App 447, 149 NW2d 457.

3. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273; *Howson v State*, 73 Ark 146, 83 SW 933; *People v Brewer*, 355 Ill 348, 189 NE 321.

4. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273.

5. § 396.

6. *Wright v Stokes* (5th Dist) 167 Ill App 3d 887, 118 Ill Dec 853, 522 NE2d 308 (by implication); *Tamper v Schaper* (Mo App) 748 SW2d 183; *Walker v Bangs*, 92 Wash 2d 854, 601 P2d 1279.

An offer of proof must establish the proposed admissibility and relevance of the tendered evidence. *Simpson v Smith* (Mo App) 771 SW2d 368.

7. *People v Robinson* (5th Dist) 56 Ill App 3d 832, 14 Ill Dec 117, 371 NE2d 1170 (disagreed on other grounds with by *People v Wolski* (2d Dist) 83 Ill App 3d 17, 38 Ill Dec 297, 403 NE2d 528, cert den 450 US 915, 67 L Ed 2d 339, 101 S Ct 1356); *School Dist. v U.S. Gypsum Co.* (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶ 11717; *Atlanta Paint & Coatings, Inc. v Conti*, 119 RI 522, 381 A2d 1034.

court may rule intelligently upon the objections to questions which have been asked.⁸ Thus, counsel must clearly state the grounds upon which he is relying either to admit or to object to an offer of proof.⁹ Neither the court nor opposing counsel can know whether evidence which a party desires to present is competent or material until it is offered.¹⁰

When an offer of proof is made, the court should assume that the facts stated can be proved by competent evidence, and rule on the offer, leaving objections to the manner of proof to be decided later.¹¹

■■■■ Observation: The timing of an offer of proof is typically within the discretion of the trial court;¹² but, where two offers of proof are made under such circumstances that it is apparent that they are intended as one offer, they should be considered together.¹³

After a party has made an offer of proof, opposing counsel may then object to and the court may rule on the admissibility of the evidence.¹⁴ Because the appellate court is not the proper forum for an original determination as to the admissibility of testimony, a ruling on an offer of proof should be made by the trial court,¹⁵ even though a ruling has been made on the same matter via a motion in limine.¹⁶

§ 437. Basis of review of exclusion of evidence

Aside from the purpose of informing the trial court and facilitating its rulings on the admission or exclusion of evidence,¹⁷ a purpose of an offer of proof is to have excluded evidence noted in the trial record for purposes of

8. *Wright v Stokes* (5th Dist) 167 Ill App 3d 887, 118 Ill Dec 853, 522 NE2d 308; *State v Davis*, 155 Me 430, 156 A2d 392, 89 ALR2d 277; *Ivy v Wal-Mart Stores, Inc.* (Mo App) 777 SW2d 682; *Huelster v St. Anthony's Medical Center* (Mo App) 755 SW2d 16; *School Dist. v U.S. Gypsum Co.* (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶ 11717; *Williams v John Hancock Mut. Life Ins. Co.* (Mo App) 718 SW2d 611; *Hawkinson Tread Tire Service Co. v Walker* (Mo App) 715 SW2d 335; *State v Shaw* (App) 90 NM 540, 565 P2d 1057; *Commonwealth v Gibson*, 264 Pa Super 548, 400 A2d 221; *Vanover v Vanover*, 77 Wyo 55, 307 P2d 117, 62 ALR2d 931.

As to offers of proof in federal courts, generally, see 12 Federal Procedure, L Ed, Evidence §§ 33:25, 33:26.

Forms: Offer of proof. 12 Am Jur Trials 549, Actions on Life Insurance Policies § 65.

9. *Di Sorbo v Grand Associates One Ltd. Partnership*, 8 Conn App 203, 512 A2d 940.

As to statement of the proof to be offered, see §§ 452 et seq.

10. *Collins v State*, 37 Ariz 353, 294 P 625; *Vanover v Vanover*, 77 Wyo 55, 307 P2d 117, 62 ALR2d 931.

An offer of proof is used to indicate to the trial court and to opposing counsel the substance of the evidence expected to be offered.

Slezak v Girzadas (1st Dist) 167 Ill App 3d 1045, 118 Ill Dec 677, 522 NE2d 132.

11. *McLearn v Hill*, 276 Mass 519, 177 NE 617, 77 ALR 1039; *Beardslee v Dolge*, 143 NY 160, 38 NE 205; *First Nat. Bank v Peltz*, 176 Pa 513, 35 A 218.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 § 9.

12. **Practice References:** Carlson, *Successful Techniques for Civil Trial* (1983), § 3:34.

13. *Desmond v Fawcett*, 226 Mass 100, 115 NE 280.

Annotations: 89 ALR2d 279 § 6.

14. *Slezak v Girzadas* (1st Dist) 167 Ill App 3d 1045, 118 Ill Dec 677, 522 NE2d 132.

15. *Ely v National Super Markets, Inc.* (4th Dist) 149 Ill App 3d 752, 102 Ill Dec 498, 500 NE2d 120, app den 114 Ill 2d 544, 108 Ill Dec 416, 508 NE2d 727; *State v Flohr* (ND) 301 NW2d 367, later app (ND) 310 NW2d 735.

16. *Ely v National Super Markets, Inc.* (4th Dist) 149 Ill App 3d 752, 102 Ill Dec 498, 500 NE2d 120, app den 114 Ill 2d 544, 108 Ill Dec 416, 508 NE2d 727.

As to motions in limine, generally, see §§ 94 et seq.

17. § 436.

appellate review.¹⁸ An exception to the exclusion of evidence must be predicated upon an actual offer of proof,¹⁹ except where the error is self-evident from the nature of the evidence excluded.²⁰

|||| Observation: Exceptions to rulings or orders of the court are unnecessary in federal court, and for all purposes for which an exception was once necessary, an objection now suffices. Many states, too, have abolished the use of exceptions.²¹ Thus, a party is required to have made offer of proof before the appellate court will determine whether evidence was properly excluded at trial,²² and it is an error for the trial court to refuse to permit a seasonable²³ offer of proof which prevents a proper review of the admissibility of evidence sought to be introduced.²⁴ Even if a trial

18. *Wright v Stokes* (5th Dist) 167 Ill App 3d 887, 118 Ill Dec 853, 522 NE2d 308; *People v Robinson* (5th Dist) 56 Ill App 3d 832, 14 Ill Dec 117, 371 NE2d 1170 (disagreed with on other grounds by *People v Wolski* (2d Dist) 83 Ill App 3d 17, 38 Ill Dec 297, 403 NE2d 528, cert den 450 US 915, 67 L Ed 2d 339, 101 S Ct 1356); *Neff v Rose* (La App 4th Cir) 546 So 2d 480, cert den (La) 551 So 2d 1322; *State v Adams* (La App 4th Cir) 537 So 2d 1262, cert gr (La) 543 So 2d 2 and affd in part and revd in part on other grounds (La) 550 So 2d 595; *State v Davis*, 155 Me 430, 156 A2d 392, 89 ALR2d 277; *Ivy v Wal-Mart Stores, Inc.* (Mo App) 777 SW2d 682; *Huelster v St. Anthony's Medical Center* (Mo App) 755 SW2d 16; *School Dist. v U.S. Gypsum Co.* (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶ 11717; *Tamper v Schaper* (Mo App) 748 SW2d 183; *Cowan v Perryman* (Mo App) 740 SW2d 303; *Hawkinson Tread Tire Service Co. v Walker* (Mo App) 715 SW2d 335; *State v Shaw* (App) 90 NM 540, 565 P2d 1057; *Walker v Bangs*, 92 Wash 2d 854, 601 P2d 1279; *State v Williams*, 34 Wash 2d 367, 209 P2d 331.

19. *Scaggs v Horton* (5th Dist) 85 Ill App 3d 541, 44 Ill Dec 504, 411 NE2d 870; *Estate of Hartz v Nelson* (Minn App) 437 NW2d 749; *State v Eggers*, 175 Neb 79, 120 NW2d 541; *State v Brewer*, 202 NC 187, 162 SE 363, 81 ALR 1424; *Boone v State* (Okla) 261 P2d 581; *Tauer v Williams*, 69 Wyo 388, 242 P2d 518, 1 OGR 983.

20. *Milenkovic v State* (App) 86 Wis 2d 272, 272 NW2d 320.

21. § 485.

22. *James v Bell Helicopter Co.* (CA5 Tex) 715 F2d 166, CCH Prod Liab Rep ¶ 9786, 14 Fed Rules Evid Serv 363; *Worn v Warren*, 191 Ga App 448, 382 SE2d 112; *Scaggs v Horton* (5th Dist) 85 Ill App 3d 541, 44 Ill Dec 504, 411 NE2d 870; *People v Slaughter* (2d Dist) 55 Ill App 3d 973, 13 Ill Dec 731, 371 NE2d 666; *Fitts v Central Maine Power Co.* (Me) 562 A2d 690; *Re Green Charitable Trust*, 172 Mich App 298, 431 NW2d 492; *Montpetit v Commis-*

sioner of Public Safety (Minn App) 392 NW2d 663; *Solis v State* (Tex App Waco) 632 SW2d 170; *Milenkovic v State* (App) 86 Wis 2d 272, 272 NW2d 320.

When the trial court sustains an objection to a question that does not on its face show the expected answer, a party must make an offer of proof to preserve error for appellate review. *Ensor v Wilson* (Ala) 519 So 2d 1244, 82 ALR4th 925, reh den (Ala) 537 So 2d 66; *Hickman v Green*, 123 Mo 165, 27 SW 440; *Farmers' & Merchants Ins. Co. v Dabney*, 62 Neb 213, 86 NW 1070, affd 189 US 301, 47 L Ed 821, 23 S Ct 565; *Union Cent. Life Ins. Co. v Pollard*, 94 Va 146, 26 SE 421.

As to necessity of an offer of proof, generally, see § 440.

For discussion of the necessity of an offer of proof in federal courts to assign error as to the exclusion of evidence, see 12 Federal Procedure, L Ed, Evidence §§ 33:25, 33:26.

23. *State v Davis*, 155 Me 430, 156 A2d 392, 89 ALR2d 277.

Where an offer of proof was tendered 8 days after the trial court had entered its decision, it could not be concluded that the trial court had acted unreasonably in denying the offer of proof. *Bank of Toronto v Lengkeek* (SD) 436 NW2d 271.

24. *Ex parte Fields* (Ala) 382 So 2d 598, on remand (Ala App) 382 So 2d 600; *Blakemore v State*, 268 Ark 145, 594 SW2d 231; *Pender v State* (Fla App D1) 432 So 2d 800; *Hendrix v Byers Bldg. Supply, Inc.*, 167 Ga App 878, 307 SE2d 759; *Stephen W. Brown Radiology Associates v Gowers*, 157 Ga App 770, 278 SE2d 653; *People v Brown* (1st Dist) 89 Ill App 3d 852, 45 Ill Dec 229, 412 NE2d 580; *People v Boyce* (1st Dist) 51 Ill App 3d 549, 9 Ill Dec 403, 366 NE2d 914; *Griese-Traylor Corp. v Lemmons* (Ind App) 424 NE2d 173, later proceeding (Ind App) 456 NE2d 448; *State v Adams* (La App 4th Cir) 537 So 2d 1262, cert gr (La) 543 So 2d 2 and affd in part and revd in part (La) 550 So 2d 595; *MacCormick v MacCormick* (Me) 478 A2d 678, later app (Me)

court suspects that the proof sought to be offered is inadmissible, a record preserving the offer and the ruling is necessary if an appellate court is to carry out its reviewing function.²⁵

A party specifying the purpose for which evidence is admissible, in an offer of proof, cannot later complain on appeal that the evidence was admissible for still another purpose.²⁶

§ 438. —Review in absence of offer of proof

The absence of a formal offer of proof does not preclude one from raising on appeal the question of admissibility of rejected evidence, where the witness is the plaintiff in the action.²⁷

Although it has been held that the exclusion of evidence cannot be complained of on appeal unless such evidence was produced at the hearing of the motion for a new trial,²⁸ or specified in such motion,²⁹ an appellate court will not decline to review the exclusion of testimony on the ground that no offer of proof was made, where the witness was allowed to answer the question and the ruling was made on a motion to strike out testimony, so that it affirmatively appears what the party seeking to introduce the testimony was trying to show.³⁰

§ 439. —Practice guide: Making the record

The objecting trial attorney is entitled to a ruling on the record regarding the objection. If the court is less than decisive in providing this, counsel should politely request a ruling. As the trial transcript reflects what is audible to the court reporter, counsel must require audible responses from witnesses, as opposed to a nod or a gesture. To further safeguard the record, counsel must sometimes insert clarifying declarations for the typed transcript, for instance, "Let the record show that the witness indicated a scar about 3 inches in length."³¹

Stipulations of counsel should be read into the record, within the jury's hearing, including stipulations respecting the admissibility of exhibits.³²

513 A2d 266; *MAB v State* (Tex App Dallas) 718 SW2d 424, petition for discretionary review ref (May 13, 1987).

The trial court's refusal to hear offer of proof, causing record of offer to go unrecorded and preventing appellate court from carrying out its reviewing function, was an error requiring reversal. *State v Flohr* (ND) 301 NW2d 367, later app (ND) 310 NW2d 735.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 § 5.

25. *State v Flohr* (ND) 301 NW2d 367, later app (ND) 310 NW2d 735 (appellate court is not the proper forum for an original determination as to the admissibility of testimony).

Where an objection is made to an offer of proof, and the court states that "part of the offer" is proper, there is no definite ruling, hence nothing for review. *Flam v Lee*, 116 Iowa 289, 90 NW 70.

26. *Commonwealth v Gibson*, 264 Pa Super 548, 400 A2d 221.

27. *Wahl v Cunningham*, 320 Mo 57, 6 SW2d 576, 67 ALR 489.

28. *Faber v Byrle*, 171 Kan 38, 229 P2d 718, 25 ALR2d 1379.

As to exclusion of evidence as a ground for a motion for a new trial, generally, see 58 Am Jur 2d, New Trial § 502.

29. *O'Neal v Bainbridge*, 94 Kan 518, 146 P 1165; *State v Robinson*, 106 W Va 276, 145 SE 383, 62 ALR 351.

30. *Cropper v Titanium Pigment Co.* (CA8 Mo) 47 F2d 1038, 78 ALR 737.

31. **Practice References:** Carlson, *Successful Techniques for Civil Trial* (1983), § 2:34.

32. **Practice References:** Carlson, *Successful Techniques for Civil Trial* (1983), § 2:34.

As to introduction of exhibits, generally, see § 346.

b. NECESSITY OF OFFER OF PROOF [§§ 440-444]

§ 440. Generally

When the trial court sustains an objection to a question that does not on its face show the expected answer, a party generally must make an offer of proof to preserve error for appellate review.³³ However, because the offer of proof is invited generally to sustain the position of a litigant, there is and could be no rule requiring a party first to obtain the court's permission to make an offer of proof.³⁴ Ordinarily, therefore, a party need not make any offer of evidence at all, but may rely on the evidence to be obtained from the witnesses as called.³⁵

■■■■ Observation: Not all practice rules specifically authorize an offer of proof.³⁶

The necessity of an offer of proof, for the purpose of getting evidence admitted for the consideration of the jury, depends on whether the evidence which the party seeks to introduce appears to be relevant and competent or whether something is necessary to connect it with the issues at bar.³⁷ For instance, an offer of proof is not necessary where the questions asked would not have produced relevant testimony, that is, evidence tending to prove a matter in controversy.³⁸ Nor is an offer necessary where the significance of the excluded evidence is shown, where all of the parties, the court, and counsel understand the character of the evidence to be presented by the witnesses, and where defendants' objections are equally well known.³⁹ Where it is not clear what a witness will say on an offer of proof, or what his basis will be for saying it, a detailed and specific offer of proof is required.⁴⁰

If an offer of proof is necessary, it is error for the trial court to refuse counsel an opportunity to state what he or she proposed to prove through the evidence.⁴¹

§ 441. Right to offer proof

A party should be allowed an appropriate opportunity to present and develop that evidence relevant to that party's theory of the case including the offering of proof under all appropriate circumstances.⁴² Thus, both in criminal

33. § 437.

34. *Collins v State*, 37 Ariz 353, 294 P 625; *Vanover v Vanover*, 77 Wyo 55, 307 P2d 117, 62 ALR2d 931.

35. *Middleton v Griffith*, 57 NJL 442, 31 A 405.

36. *Casalo v Claro*, 147 Conn 625, 165 A2d 153.

37. *Washington Nat. Ins. Co. v Meeks*, 249 Ark 73, 458 SW2d 135, later app 252 Ark 1178, 482 SW2d 618; *Carroll v Beavers*, 126 Cal App 2d 828, 273 P2d 56, 59 ALR2d 263.

As to the required showing that offers of proof be relevant and material, generally, see §§ 457 et seq.

38. *Re Marriage of Strauss* (2d Dist) 183 Ill App 3d 424, 132 Ill Dec 245, 539 NE2d 808.

39. § 437.

40. *People v Robinson* (5th Dist) 56 Ill App

3d 832, 14 Ill Dec 117, 371 NE2d 1170 (disagreed with on other grounds by *People v Wolski* (2d Dist) 83 Ill App 3d 17, 38 Ill Dec 297, 403 NE2d 528, cert den 450 US 915, 67 L Ed 2d 339, 101 S Ct 1356).

As to the requirement of a specific statement of the proof, generally, see § 453.

41. *Re Marriage of Strauss* (2d Dist) 183 Ill App 3d 424, 132 Ill Dec 245, 539 NE2d 808.

42. *People v Scheck*, 356 Ill 56, 190 NE 108, 91 ALR 1472; *Dunning v Maine C.R. Co.*, 91 Me 87, 39 A 352; *State v Young*, 52 Or 227, 96 P 1067; *Stauffer Chemical Co. v Curry* (Wyo) 778 P2d 1083, 10 UCCRS2d 342.

A party has the right to introduce evidence of those relevant and material facts which logically tend to prove the issues involved and which is not otherwise excluded. *Kaeo v Davis*, 68 Hawaii 447, 719 P2d 387.

and civil cases, a party has a legal right, when evidence has been excluded, to make an offer of proof of what counsel expects to prove.⁴³ The right to make an offer of proof is absolute⁴⁴ and, in a criminal case, is almost absolute if timely made.⁴⁵

Although it is generally improper to deny an attorney the right to make an offer of proof in any given matter, the gravity of the mistake must be considered in relation to the facts of each case.⁴⁶

§ 442. —Proof of admitted facts; waiver

A party to an action is not required to prove allegations which his adversary admits to be true.⁴⁷ Thus, no evidence or finding is needed to establish a fact conceded by answer.⁴⁸ However, the admission of proof of admitted facts is a matter resting in the discretion of the trial judge, and it is not in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove.⁴⁹ The court, however, may refuse to admit further proof of facts which have been admitted by the opposing party if such proof would be superfluous or cumbersome, or would tend to confuse the jury.⁵⁰

A waiver of formal proof arises where a party acquiesces in the statement of the court that no evidence is necessary on a certain point because no one questions its truth.⁵¹ The rule is that notwithstanding an accused's admission of facts, the prosecution is entitled to introduce in evidence testimony to establish such facts,⁵² provided that the testimony offered is otherwise admissible and not unduly prejudicial to the accused.⁵³

43. § 437.

44. *Spence v State* (Tex Crim) 758 SW2d 597, later app (Tex Crim) 795 SW2d 743, reh den (Sep 19, 1990) and cert den (US) 113 L Ed 2d 271, 111 S Ct 1339.

45. *State v Shaw* (App) 90 NM 540, 565 P2d 1057.

46. *People v Brown* (1st Dist) 89 Ill App 3d 852, 45 Ill Dec 229, 412 NE2d 580 (denial of offer not prejudicial where proof against defendant was overwhelming and excluded proof was likely to be cumulative).

47. *Eubank v Spencer*, 203 Va 923, 128 SE2d 299.

As to judicial admissions, and proof of admitted facts in pleadings, generally, see 29 Am Jur 2d, Evidence §§ 615, 687 et seq.

48. *Armstrong Paint & Varnish Works v Nu-Enamel Corp.*, 305 US 315, 83 L Ed 195, 59 S Ct 191, reh den 305 US 675, 83 L Ed 437, 59 S Ct 356.

As to the necessity of objecting to evidence offered in contradiction of admitted facts to prevent waiver of error, see § 415.

For discussion of waiver as a result of offering evidence contradicting a party's own admissions, see § 421.

49. *McHenry v United States*, 51 App DC 119, 276 F 761, 34 ALR 1109; *Hes v Haviland*

Products Co., 6 Mich App 163, 148 NW2d 509; *Piper v Barber Transp. Co.*, 79 SD 353, 112 NW2d 329.

The rule that a party is not required to accept a judicial admission of his adversary, but may insist on proving the fact, has been applied in determining the effect of an admission of liability on the admission of evidence as to the circumstances of an accident on the issue of damages in a tort action for personal injury, wrongful death, or property damage. *Eubank v Spencer*, 203 Va 923, 128 SE2d 299; *Murray v Mossman*, 52 Wash 2d 885, 329 P2d 1089.

On an agreed case, however, the court cannot over objection receive additional evidence. 3 Am Jur 2d, Agreed Case §§ 7, 31.

50. *Hes v Haviland Products Co.*, 6 Mich App 163, 148 NW2d 509.

51. *Benner v Atlantic Dredging Co.*, 134 NY 156, 31 NE 328; *Ratliff v Ratliff*, 131 NC 425, 42 SE 887; *Washington v Cecil*, 53 Wis 2d 710, 193 NW2d 674.

52. *Cockrum v State*, 186 Ark 14, 52 SW2d 642; *State v Billington*, 241 Minn 418, 63 NW2d 387; *Reeves v State*, 116 Tex Crim 451, 32 SW2d 471.

53. *State v Billington*, 241 Minn 418, 63 NW2d 387; *Alexander v State*, 84 Tex Crim 75, 204 SW 644.

§ 443. Offer on exclusion of evidence

In criminal and civil cases, a party has a legal right, when evidence has been excluded, to make an offer of proof of what counsel expects to prove.⁵⁴ The party asking a question to which an objection has been sustained must be given the opportunity to make an offer of proof,⁵⁵ in order to preserve the court's ruling for review.⁵⁶ If a trial court could arbitrarily deny counsel the right to dictate into the record their offer of proof, it could prevent any consideration upon appeal as to the correctness of the ruling in relation to the exclusion of particular evidence.⁵⁷

In order to make the exclusion of an answer to a question put to a witness reversible error, the question must clearly admit of an answer favorable to the party proposing it on a matter manifestly relevant to the issue,⁵⁸ although this rule does not apply to appropriate questions asked on cross-examination.⁵⁹ It is not necessary that an offer of proof be made where the significance of the excluded evidence is shown,⁶⁰ or where all of the parties,⁶¹ the court, and counsel understand the character of the evidence to be presented by the witnesses and where defendants' objections are equally well known.⁶² Thus, where the question shows the purpose and materiality of the evidence, the evidence cannot be excluded because of absence of an offer of proof as to what the answer to the question will be.⁶³

54. *State v Adams* (La App 4th Cir) 537 So 2d 1262, cert gr (La) 543 So 2d 2 and affd in part and revd in part (La) 550 So 2d 595.

55. *Ex parte Fields* (Ala) 382 So 2d 598, on remand (Ala App) 382 So 2d 600.

In action on contract for personal guaranty, trial court erred in refusing to hear offer of proof regarding testimony of defendant's witness as to conversation with alleged agent of plaintiff, since counsel was entitled to opportunity to state what he proposed to prove by proffered evidence. *Hendrix v Byers Bldg. Supply, Inc.*, 167 Ga App 878, 307 SE2d 759.

In civil cases, trial judges must, when a party seeks to offer proof, allow a complete record of the proffered testimony or allow presentation of a statement describing what the party expects to prove by the proffered evidence. *State v Adams* (La App 4th Cir) 537 So 2d 1262, cert gr (La) 543 So 2d 2 and affd in part and revd in part (La) 550 So 2d 595.

When the court excludes evidence, the appellant has an absolute right to place that same "irrelevant" evidence into the record for appellate review and the court's absolute limitation of such right constitutes error. *Spence v State* (Tex Crim) 758 SW2d 597, later app (Tex Crim) 795 SW2d 743, reh den (Sep 19, 1990) and cert den (US) 113 L Ed 2d 271, 111 S Ct 1339.

56. § 437.

57. *State v Shaw* (App) 90 NM 540, 565 P2d 1057.

58. *Origet v Hedden*, 155 US 228, 39 L Ed 130, 15 S Ct 92.

59. § 444.

60. *Carroll v Beavers*, 126 Cal App 2d 828, 273 P2d 56, 59 ALR2d 263; *Hartnett v Boston Store of Chicago*, 265 Ill 331, 106 NE 837; *Re Adoption of G. (Okla)* 656 P2d 262; *Moosavi v State* (Tex Crim) 711 SW2d 53.

Where a party's objections are well known, and where the subject matter of the testimony was the basis for a previous motion in limine in which such evidence was excluded, the plaintiff does not waive an alleged error by failing to make a formal offer of proof. *Scaggs v Horton* (5th Dist) 85 Ill App 3d 541, 44 Ill Dec 504, 411 NE2d 870.

As to the requisite formality of an offer of proof, generally, see § 445.

61. *Hawkinson Tread Tire Service Co. v Walker* (Mo App) 715 SW2d 335.

62. *Scaggs v Horton* (5th Dist) 85 Ill App 3d 541, 44 Ill Dec 504, 411 NE2d 870 (offer of proof is unnecessary whenever the trial judge understands the objection and character of the evidence but will not admit such evidence).

63. *State v Daymus*, 90 Ariz 294, 367 P2d 647; *Hartnett v Boston Store of Chicago*, 265 Ill 331, 106 NE 837; *Re Kimble's Estate*, 73 Nev 25, 307 P2d 615; *State v Shaw* (App) 90 NM 540, 565 P2d 1057; *State v Ditzel*, 77 Wyo 242, 314 P2d 832.

§ 444. Offer on cross-examination; surrebuttal

■■■■ Observation: Generally, an offer of proof is not required for an aggrieved party to protect his claim of error if the proffered evidence was sought by questions asked during cross-examination or recross-examination.⁶⁴

Where proof is sought to be elicited on cross-examination, and is excluded, it is not necessary to make an offer of proof to present the question for review,⁶⁵ particularly where the record shows that the substance of the evidence excluded was apparent from the context of the cross-examination,⁶⁶ but there is authority to the contrary.⁶⁷

On cross-examination, if it does not reasonably appear that the evidence sought may be relevant and material, the court may in its discretion require of counsel a bare intimation of the purpose to be served.⁶⁸ An exhaustive proffer is not normally a strict requirement for initiation of a line of cross-examination.⁶⁹

Where the introduction of surrebuttal testimony is refused, the defendants should make an offer of proof so that the record will show whether the evidence, if competent, would have been material.⁷⁰

C. MANNER OF OFFER OF PROOF [§§ 445-451]

§ 445. Generally; formality of offer

An offer of proof may be made by the attorney, who informs the court what the expected answer or evidence would have been; by the witness, stating responses to the challenged questions; or, by a tangible offer, where evidence involves a document or record.⁷¹

■■■■ Observation: The timing of an offer of proof is typically within the discretion of the trial court.⁷²

Trial judges must, when a party wishes to make an offer of proof, either allow a complete record of the proffered testimony or allow presentation of a statement describing what the party expects to prove by the proffered evi-

64. Practice References: Carlson, *Successful Techniques for Civil Trial* (1983), § 2:34.

65. *Roberts v C & M Ready Mix Concrete Co.* (Colo App) 767 P2d 769; *Casalo v Claro*, 147 Conn 625, 165 A2d 153; *Uhlman v Farm, Stock & Home Co.*, 126 Minn 239, 148 NW 102.

66. *Roberts v C & M Ready Mix Concrete Co.* (Colo App) 767 P2d 769.

67. *Washington Nat. Ins. Co. v Meeks*, 249 Ark 73, 458 SW2d 135, later app 252 Ark 1178, 482 SW2d 618; *O'Brien v Great N.R. Co.*, 145 Mont 13, 400 P2d 634; *State v Frazier*, 101 RI 156, 221 A2d 468.

68. *Fahey v Clark*, 125 Conn 44, 3 A2d 313, 120 ALR 517.

As to requisite showing that an offer of proof is relevant and material, see § 458.

69. *Jones v United States* (Dist Col App) 516 A2d 513.

70. *First Nat. Bank v Vagg*, 65 Mont 34, 212 P 509.

71. Practice References: Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19:19.

See, also, for discussion of the manner of making an offer of proof, Carlson, *Successful Techniques for Civil Trial* (1983), § 3:34.

72. Practice References: Carlson, *Successful Techniques for Civil Trial* (1983), § 3:34.

dence.⁷³ A formal offer of proof, in the form of questions to the witness outside a hearing of the jury, is no longer the sole means of perfecting appeal from the denial of an evidentiary request.⁷⁴

§ 446. —Effect of circumstances of case

Notwithstanding that evidence must be proffered in correct form,⁷⁵ the requisite formality of an offer of proof depends upon the circumstances of the particular case.⁷⁶ For instance, when the nature and substance of the evidence offered is obvious, a formal offer of proof is unnecessary and a statement of counsel may suffice.⁷⁷ Where both court and counsel understand the character of the evidence to be presented by the witnesses, and where defendants' objections are equally well known, a formal offer of proof is unnecessary.⁷⁸ A formal offer of proof is not required when it is apparent from the attitude of the court that the proposed evidence will be rejected.⁷⁹

§ 447. Offer by question and answer

In some jurisdictions, the preferred procedure for an offer of proof is to put the witness on the stand and elicit the testimony in question and answer form,⁸⁰ although it has been recognized that a formal offer of proof, in the

73. *State v Adams* (La App 4th Cir) 537 So 2d 1262, cert gr (La) 543 So 2d 2 and affd in part and revd in part (La) 550 So 2d 595; *Llorence v Natchitoches Parish School Bd.* (La App 3d Cir) 529 So 2d 479, cert den (La) 532 So 2d 176; *Milenkovic v State* (App) 86 Wis 2d 272, 272 NW2d 320.

Plaintiff was not denied a fair trial because of the trial judge's refusal of a proffer of proof, where plaintiff filed a motion in open court to fix the time for making an offer of proof, and in such motion, plaintiff specifically set forth what was expected to be prove through the proffered testimony since, by allowing plaintiff to file the motion in the record, the court in fact permitted plaintiff to make a statement setting forth the nature of the evidence. *Llorence v Natchitoches Parish School Bd.* (La App 3d Cir) 529 So 2d 479, cert den (La) 532 So 2d 176.

As to a statement by counsel as to what an offer of proof is intended to show, see § 452.

74. § 447.

75. *Collins v State*, 37 Ariz 353, 294 P 625; *Burnett v San Diego*, 127 Cal App 2d 191, 273 P2d 345, 47 ALR2d 1079; *Shoemaker v Selnes*, 220 Or 573, 349 P2d 473, 87 ALR2d 170.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 § 6.

76. *Slezak v Girzadas* (1st Dist) 167 Ill App 3d 1045, 118 Ill Dec 677, 522 NE2d 132; *Wright v Stokes* (5th Dist) 167 Ill App 3d 887, 118 Ill Dec 853, 522 NE2d 308; *Scaggs v Horton* (5th Dist) 85 Ill App 3d 541, 44 Ill Dec 504, 411 NE2d 870.

Even where no formal offer of proof of a

party's discovery responses was made, the party's election to stand on such responses to interrogatories and request for admissions constitutes a sufficient offer of that evidence to effect a motion for summary judgment by the insurer in an action for breach of warranty of title and rescission of automobile purchase agreement against the seller and an insurer of a stolen car sold to the plaintiff. *Mercer v Braziel* (Okla App) 746 P2d 702, 4 UCCRS2d 1370.

Annotations: 89 ALR2d 279 § 6.

77. *Wright v Stokes* (5th Dist) 167 Ill App 3d 887, 118 Ill Dec 853, 522 NE2d 308.

As to a statement by counsel as to what an offer of proof is intended to show, see § 452.

78. § 437.

79. *People v Robinson* (5th Dist) 56 Ill App 3d 832, 14 Ill Dec 117, 371 NE2d 1170 (disagreed with on other grounds by *People v Wolski* (2d Dist) 83 Ill App 3d 17, 38 Ill Dec 297, 403 NE2d 528, cert den 450 US 915, 67 L Ed 2d 339, 101 S Ct 1356).

80. *Huelster v St. Anthony's Medical Center* (Mo App) 755 SW2d 16; *School Dist. v U.S. Gypsum Co.* (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶ 11717; *Tamper v Schaper* (Mo App) 748 SW2d 183; *Cowan v Perryman* (Mo App) 740 SW2d 303; *Arndt v Rainbow Glass Co.* (Mo App) 720 SW2d 373; *Hawkinson Tread Tire Service Co. v Walker* (Mo App) 715 SW2d 335; *In Marriage of B.* (Mo App) 559 SW2d 73; *State v Dreske* (App) 88 Wis 2d 60, 276 NW2d 324.

The trial court, on opposing counsel's objection, properly refused to admit testimony,

form of questions to the witness outside a hearing of the jury, is no longer the sole means of perfecting appeal from the denial of an evidentiary request.⁸¹

Where made in the course of examination of witnesses, an offer of proof should follow a question put to a witness and objected to by the opposing party,⁸² and, generally, it should follow the ruling of the trial court sustaining the objection.⁸³

■■■■ **Observation:** The timing of an offer of proof is typically within the discretion of the trial court.⁸⁴

A defendant, on seeking a continuance to procure a witness, must make an offer of that witness's testimony.⁸⁵

§ 448. —Use of narrative by counsel

In jurisdictions where the preferred procedure for an offer of proof is to put the witness on the stand and elicit the testimony in question and answer form,⁸⁶ an offer of proof by which counsel merely recites what the attorney believes the witness will say,⁸⁷ or summarizes the proposed testimony of witness, rather than allowing witness to give testimony in question and answer form, is inadequate.⁸⁸ Courts in some jurisdictions have allowed offers of proof in narrative form, usually a summary of the proposed testimony of the witness, so long as the offer does not include the conclusions of counsel.⁸⁹ Thus, a narrative offer of proof may occasionally be found to be adequate, if it is presented with certainty and detail sufficient to demonstrate its quality as relevant, material, and probative evidence.⁹⁰

where the defense failed to call and question any witness about the proof it wanted to offer, and where the trial court did not prevent the defense from calling any such witnesses. *Creative Leasing, Inc. v Cannon* (Ala App) 496 So 2d 79.

Defense counsel's offer of proof was properly denied where counsel merely indicated that he would offer two witnesses, without putting the witnesses on the stand to answer questions so that trial court could intelligently rule on propriety and admissibility of evidence sought to be elicited. *State v Sullivan* (Mo App) 553 SW2d 510.

81. *Hall v Northwestern University Medical Clinics* (1st Dist) 152 Ill App 3d 716, 105 Ill Dec 496, 504 NE2d 781.

82. *Fredrickson & Watson Const. Co. v Boyd*, 60 Nev 117, 102 P2d 627; *State v Mastracchio*, 78 RI 496, 82 A2d 889.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 §§ 4[a], 11.

83. *State v Loftis*, 89 Ariz 403, 363 P2d 585; *Fredrickson & Watson Const. Co. v Boyd*, 60 Nev 117, 102 P2d 627.

However, it has also been held that the offer should be made immediately after the objection

to the question was interposed and before the trial court ruled on that objection. *Bruce v State*, 199 Ind 489, 158 NE 480.

Annotations: 89 ALR2d 279 § 4[b].

84. Practice References: Carlson, *Successful Techniques for Civil Trial* (1983), § 3:34.

85. *People v Boyce* (1st Dist) 51 Ill App 3d 549, 9 Ill Dec 403, 366 NE2d 914.

86. § 447.

87. *School Dist. v U.S. Gypsum Co.* (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶ 11717; *State v Dreske* (App) 88 Wis 2d 60, 276 NW2d 324.

88. *In Marriage of B.* (Mo App) 559 SW2d 73.

As to the requirement, generally, of a statement of counsel as to the offer of proof is intended to show, see § 452.

89. *Huelster v St. Anthony's Medical Center* (Mo App) 755 SW2d 16.

As to the efficacy of counsel's stated conclusions as an offer of proof, see § 456.

90. *School Dist. v U.S. Gypsum Co.* (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶ 11717.

As to statements of proof and the required showing of relevance and materiality, see §§ 457 et seq.

§ 449. —Use of hypothetical question

An offer of proof in the form of questions and answers, addressed to the issues of degree of care and causation by means of a hypothetical question, in which the defendants failed to identify specific inadequacies, is insufficient.⁹¹

§ 450. —Disclosure of witness

Generally, where an offer of proof is the testimony of a witness, the witness must be disclosed,⁹² and the failure of an offer of proof to name the witness or witnesses who will testify to the facts stated in the offer is a defect which justifies rejection of the offer.⁹³

§ 451. Offer in presence of jury

Generally, an offer of proof, where necessary or appropriate, should be made outside the hearing of the jury,⁹⁴ whenever practicable.⁹⁵ But a formal offer of proof in the form of questions to the witness outside a hearing of the jury is no longer the sole means of perfecting appeal from the denial of an evidentiary request.⁹⁶

When a protective order excluding evidence has once been granted, an offer of proof regarding same evidence made during course of trial must be made in the absence of the jury.⁹⁷

d. SUFFICIENCY OF OFFER OF PROOF [§§ 452-460]

(1) STATEMENT OF PROOF [§§ 452-456]

§ 452. Generally

A party making an offer of proof must state clearly what it is intended to

91. *Walker v Bangs*, 92 Wash 2d 854, 601 P2d 1279.

92. *Scotland County v Hill*, 112 US 183, 28 L Ed 692, 5 S Ct 93; *Scaggs v Horton* (5th Dist) 85 Ill App 3d 541, 44 Ill Dec 504, 411 NE2d 870; *State v Brewer*, 202 NC 187, 162 SE 363, 81 ALR 1424; *Boone v State* (Okla) 261 P2d 581; *Tauer v Williams*, 69 Wyo 388, 242 P2d 518, 1 OGR 983.

93. *Stickel v San Diego E.R. Co.*, 32 Cal 2d 157, 195 P2d 416; *Byrd v Savage* (3rd Dist) 219 Cal App 2d 396, 32 Cal Rptr 881; *Miller v Larson* (ND) 95 NW2d 569.

Where plaintiff had been specifically ordered to notify counsel and court of substance of witness's testimony and where no excuse was presented by plaintiff for failure to advise court before surprise expert witness was called, trial court did not abuse its discretion in refusing to receive plaintiff's proffered proof. *Coleco Industries, Inc. v Berman* (CA3 Pa) 567 F2d 569, CCH Fed Secur L Rep ¶96253, 24 FR Serv 2d 516, cert den 439 US 830, 58 L Ed 2d 124, 99 S Ct 106, reh den 439 US 998, 58 L Ed 2d 671, 99 S Ct 601.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 § 15.

94. *People v Shannon* (Colo) 683 P2d 792;

Evans v State, 180 Ga App 1, 348 SE2d 561; *Slezak v Girzadas* (1st Dist) 167 Ill App 3d 1045, 118 Ill Dec 677, 522 NE2d 132; *White v Crow*, 245 Ind 276, 198 NE2d 222; *State v Adams* (La App 4th Cir) 537 So 2d 1262, cert gr (La) 543 So 2d 2 and affd in part and revd in part (La) 550 So 2d 595; *State v Davis*, 155 Me 430, 156 A2d 392, 89 ALR2d 277; *Tortora v General Motors Corp.*, 373 Mich 563, 130 NW2d 21; *State v Carr*, 13 Wash App 704, 537 P2d 844.

In a prosecution for rape, in order to introduce evidence of a victim's prior sexual behavior, the defense must first make an offer of proof in the form of a pretrial motion accompanied by an affidavit or affidavits, the trial court then has the discretion to determine whether the offer of proof is sufficient such that a hearing outside the presence of the jury is warranted. *State v Bray*, 23 Wash App 117, 594 P2d 1363.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 § 3.

95. *Milenkovic v State* (App) 86 Wis 2d 272, 272 NW2d 320.

96. § 447.

97. *State v Reeves*, 234 Kan 250, 671 P2d 553.

prove,⁹⁸ including what the offered proof or testimony will be, by whom and how it was made, and its purpose.⁹⁹

At the time an offer of proof is made, there must be an explanation of why the evidence should be admissible.¹ The trial court is not required to admit² or exclude evidence not yet heard unless such evidence is stated to the court so that its relevancy and materiality may be determined.³ Thus, when the materiality of evidence is challenged, it is essential that counsel state what is expected to be proved by the offered evidence so that the court may determine its materiality.⁴

98. *Ex parte Fields* (Ala) 382 So 2d 598, on remand (Ala App) 382 So 2d 600; *Di Sorbo v Grand Associates One Ltd. Partnership*, 8 Conn App 203, 512 A2d 940; *Hendrix v Byers Bldg. Supply, Inc.*, 167 Ga App 878, 307 SE2d 759; *Thompson v Hill*, 143 Ga App 272, 238 SE2d 271; *Commonwealth v Geagan*, 339 Mass 487, 159 NE2d 870, cert den 361 US 895, 4 L Ed 2d 152, 80 S Ct 200; *Kinney v State* (Miss) 336 So 2d 493; *State v Feltrop* (Mo) 343 SW2d 36; *Taggart v Jaffrey*, 75 NH 473, 76 A 123; *Middleton v Griffith*, 57 NJL 442, 31 A 405; *New York Life Ins. Co. v Hansen*, 71 ND 383, 2 NW2d 163.

In murder prosecution, where defense counsel made an offer of proof stating that the witness psychiatrist would testify that accused had suffered from post-traumatic amnesia at time of accused's interview with second court-appointed psychiatrist and that defendant's wish that her husband "would drop dead" was a normal fantasy, the trial court erred in ruling that defense witness could not testify since offer of proof clearly indicated that testimony was relevant to extent of explaining criminal intent, motive, and reliability of defendant's post-incident statements. *State v Thacker*, 94 Wash 2d 276, 616 P2d 655.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 §§ 6, 7.

99. *Coleco Industries, Inc. v Berman* (CA3 Pa) 567 F2d 569, CCH Fed Secur L Rep ¶96253, 24 FR Serv 2d 516, cert den 439 US 830, 58 L Ed 2d 124, 99 S Ct 106, reh den 439 US 998, 58 L Ed 2d 671, 99 S Ct 601; *Slezak v Girzadas* (1st Dist) 167 Ill App 3d 1045, 118 Ill Dec 677, 522 NE2d 132; *Piano v Davison* (1st Dist) 157 Ill App 3d 649, 110 Ill Dec 35, 510 NE2d 1066, app den 119 Ill 2d 574, 119 Ill Dec 397, 522 NE2d 1256; *Scaggs v Horton* (5th Dist) 85 Ill App 3d 541, 44 Ill Dec 504, 411 NE2d 870; *People v Slaughter* (2d Dist) 55 Ill App 3d 973, 13 Ill Dec 731, 371 NE2d 666; *Kinney v State* (Miss) 336 So 2d 493; *State v Sullivan* (Mo App) 553 SW2d 510; *State v Brewer*, 202 NC 187, 162 SE 363, 81 ALR 1424; *Boone v State* (Okla) 261 P2d 581; *Tauer v Williams*, 69 Wyo 388, 242 P2d 518, 1 OGR 983.

The trial court did not err in rejecting defen-

dant's offer of proof where offer did not reveal basis of defendant's testimony. *People v Robinson* (5th Dist) 56 Ill App 3d 832, 14 Ill Dec 117, 371 NE2d 1170 (disagreed with on other grounds by *People v Wolski* (2d Dist) 83 Ill App 3d 17, 38 Ill Dec 297, 403 NE2d 528, cert den 450 US 915, 67 L Ed 2d 339, 101 S Ct 1356).

Trial court properly rejected offer of proof as inexplicit where counsel stated that he did not know what the testimony would be. *Montez v State* (Wyo) 573 P2d 34.

Annotations: 89 ALR2d 279 § 7.

1. *Di Sorbo v Grand Associates One Ltd. Partnership*, 8 Conn App 203, 512 A2d 940; *Arndt v Rainbow Glass Co.* (Mo App) 720 SW2d 373.

Where a reviewing court would have, from the record, to guess whether the contents of the witness's answer to the question counsel wished to put to him would have been improper evidence, counsel's statement for the plaintiffs that all he wanted to do was ask the witness if the police took him in for a blood test, was an insufficient offer of proof which failed to establish the proposed admissibility and relevance of the tendered evidence. *Simpson v Smith* (Mo App) 771 SW2d 368.

2. *Coleco Industries, Inc. v Berman* (CA3 Pa) 567 F2d 569, CCH Fed Secur L Rep ¶96253, 24 FR Serv 2d 516, cert den 439 US 830, 58 L Ed 2d 124, 99 S Ct 106, reh den 439 US 998, 58 L Ed 2d 671, 99 S Ct 601; *Louisville & N.R. Co. v Ashley*, 169 Ky 330, 183 SW 921; *Old Colony Trust Co. v Third Universalist Soc.*, 285 Mass 146, 188 NE 711, 91 ALR 837; *Beauregard v Benjamin F. Smith Co.*, 213 Mass 259, 100 NE 627; *Curran v Curran*, 219 NC 815, 15 SE2d 279.

3. *Silver v State*, 110 Tex Crim 512, 8 SW2d 144, 60 ALR 290, application den 110 Tex Crim 521, 9 SW2d 358, 60 ALR 297.

4. *People v Slaughter* (2d Dist) 55 Ill App 3d 973, 13 Ill Dec 731, 371 NE2d 666; *Williams v John Hancock Mut. Life Ins. Co.* (Mo App) 718 SW2d 611; *Richmond v Warren Institution for Sav.*, 307 Mass 483, 30 NE2d 407, 132 ALR 859.

§ 453. Specificity of statement

Because a trial court should not be put in error by ruling on an indefinite and inconclusive offer of proof,⁵ an offer of proof advanced by counsel at a trial ought to be explicit,⁶ reasonably definite, and specific,⁷ rather than general, and should be designed to make the trial justice fully aware of the substance and value of the proposed evidence,⁸ particularly where the record shows some disagreement as to the content of the statements to be offered into proof and the context in which they were offered.⁹

§ 454. Statement of supporting facts

Whenever the competency or materiality of an offer of proof depends on facts, they must be stated.¹⁰

An offer of proof need not be stated with complete precision or in unnecessary detail, but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt.¹¹ Thus, a statement of facts should be complete,¹² full, and specific, so that its exclusion would be erroneous in any point of view,¹³ and clear and distinct, without doubtful or uncertain import.¹⁴

5. *Kinney v State* (Miss) 336 So 2d 493.

6. *Montez v State* (Wyo) 573 P2d 34.

7. *Huelster v St. Anthony's Medical Center* (Mo App) 755 SW2d 16; *School Dist. v U.S. Gypsum Co.* (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶11717; *Cowan v Perryman* (Mo App) 740 SW2d 303; *Arndt v Rainbow Glass Co.* (Mo App) 720 SW2d 373; *State v Sullivan* (Mo App) 553 SW2d 510; *Spence v Jones*, 83 NC App 8, 348 SE2d 819 (disapproved on other grounds by *Armstrong v Armstrong*, 322 NC 397, 368 SE2d 595); *Atlanta Paint & Coatings, Inc. v Conti*, 119 RI 522, 381 A2d 1034.

Notwithstanding that the names of certain articles and textbooks were read into the record, and although plaintiffs argued that the various experts testified that the proffered materials were authoritative, where the record showed only that the witness recognized an author's name, counsel's general statement to the court that he wanted the expert witnesses to read from the text in aid of explaining the pathology to the jury, did not satisfy the requisite specificity needed for a proper offer of proof. *Piano v Davison* (1st Dist) 157 Ill App 3d 649, 110 Ill Dec 35, 510 NE2d 1066, app den 119 Ill 2d 574, 119 Ill Dec 397, 522 NE2d 1256.

When the court requested that defense counsel make an offer of proof, counsel's statement that he "inquired of witness as to conversations that took place" completely lacked specificity and definite facts which would establish the admissibility of the testimony and preserve the issue for review, where, on the basis of the court record, it was unclear what the testimony would have been or whether it would have

been helpful to the defendant. *Hawkinson Tread Tire Service Co. v Walker* (Mo App) 715 SW2d 335.

8. *School Dist. v U.S. Gypsum Co.* (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶11717; *Atlanta Paint & Coatings, Inc. v Conti*, 119 RI 522, 381 A2d 1034.

An offer of proof should enable a reviewing court to act with reasonable confidence that the evidentiary hypothesis can be sustained and is not merely an enthusiastic advocate's overstated assumption. *Milenkovic v State* (App) 86 Wis 2d 272, 272 NW2d 320.

9. *Tamper v Schaper* (Mo App) 748 SW2d 183.

10. *Fahey v Clark*, 125 Conn 44, 3 A2d 313, 120 ALR 517; *Koser v Hornback*, 75 Idaho 24, 265 P2d 988, 44 ALR2d 1015; *Shoemaker v Selnes*, 220 Or 573, 349 P2d 473, 87 ALR2d 170; *Re Estate of Patrick* (Wyo) 397 P2d 273.

Testimony that parties knew of a fact should be accompanied by an offer to prove the fact, and should be renewed after the fact is shown. *Idaho & Oregon Land Improv. Co. v Bradbury*, 132 US 509, 33 L Ed 433, 10 S Ct 177.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 § 13.

11. *Milenkovic v State* (App) 86 Wis 2d 272, 272 NW2d 320.

12. *Lewis, Hubbard & Co. v Montgomery Supply Co.*, 59 W Va 75, 52 SE 1017.

13. *Fahey v Clark*, 125 Conn 44, 3 A2d 313, 120 ALR 517; *Koser v Hornback*, 75 Idaho 24, 265 P2d 988, 44 ALR2d 1015; *Kinney v State* (Miss) 336 So 2d 493; *Shoemaker v Selnes*, 220

§ 455. —Effect of testimony to fact

Where it is obvious that a witness is competent to testify as to a particular fact, and it is obvious what his testimony will be if he is permitted to give it, an offer of proof is unnecessary and a statement of counsel may suffice.¹⁵ Further, where a question put to a witness is in proper form and clearly admits of an answer relative to the issue and favorable to the party on whose side the witness is called, such party is not bound to state the purpose for which he offers the testimony or to state the facts he proposes to prove by the answer, unless the court requires him to do so.¹⁶ However, where it is not clear what a witness will say on an offer of proof, or what his basis will be for saying it, a detailed and specific offer of proof is required.¹⁷

■■■■ Observation: In some jurisdictions, an offer of proof in the form of counsel's statement or summary of and to what a witness is expected to testify is an inadequate offer of proof. Questions actually propounded to the witness on the stand are preferred.¹⁸

§ 456. Statement of conclusions of counsel

Although a formal offer of proof in the form of questions to the witness is no longer the sole means of perfecting appeal from the denial of an evidentiary request, the unsupported speculation or conjecture of counsel is insufficient.¹⁹ An offer of proof should not be a mere statement of the conclusions of counsel.²⁰ For instance, the description of an offer of proof by counsel to the effect that he would have the witness testify as to his physical condition in relation to the work he could do before and after the accident, did not involve the subject matter of the questions propounded to the witness and thus, were not specific and definite.²¹ Counsel should not merely allude in generalities to what might be divulged by the testimony.²²

Or 573, 349 P2d 473, 87 ALR2d 170; Atlanta Paint & Coatings, Inc. v Conti, 119 RI 522, 381 A2d 1034 (offer of proof was too general); Re Estate of Patrick (Wyo) 397 P2d 273.

An offer of proof was not sufficient where trial court, though understanding that evidence was being offered to show intent, was not informed of specific substance of testimony. People v Slaughter (2d Dist) 55 Ill App 3d 973, 13 Ill Dec 731, 371 NE2d 666.

Annotations: 89 ALR2d 279 § 13.

14. Kinsey v State, 49 Ariz 201, 65 P2d 1141, 125 ALR 3; Rutten v Investors Life Ins. Co., 258 Iowa 749, 140 NW2d 101; Kennedy v Supnick, 82 Okla 208, 200 P 151, 28 ALR 1520.

15. Slezak v Girzadas (1st Dist) 167 Ill App 3d 1045, 118 Ill Dec 677, 522 NE2d 132; Scaggs v Horton (5th Dist) 85 Ill App 3d 541, 44 Ill Dec 504, 411 NE2d 870.

16. Carroll v Beavers, 126 Cal App 2d 828, 273 P2d 56, 59 ALR2d 263; Hartnett v Boston Store of Chicago, 265 Ill 331, 106 NE 837.

17. § 440.

18. § 447.

19. Hall v Northwestern University Medical Clinics (1st Dist) 152 Ill App 3d 716, 105 Ill Dec 496, 504 NE2d 781.

As to the efficacy of narrative by counsel in offers of proof by question and answer, generally, see § 448.

20. Ivy v Wal-Mart Stores, Inc. (Mo App) 777 SW2d 682; Huelster v St. Anthony's Medical Center (Mo App) 755 SW2d 16; School Dist. v U.S. Gypsum Co. (Mo App) 750 SW2d 442, CCH Prod Liab Rep ¶ 11717; Tamper v Schaper (Mo App) 748 SW2d 183; Cowan v Perryman (Mo App) 740 SW2d 303; Hawkinson Tread Tire Service Co. v Walker (Mo App) 715 SW2d 335; Duncan v Price (Mo App) 620 SW2d 70; State v Sullivan (Mo App) 553 SW2d 510.

21. Cowan v Perryman (Mo App) 740 SW2d 303.

22. Piano v Davison (1st Dist) 157 Ill App 3d 649, 110 Ill Dec 35, 510 NE2d 1066, app den 119 Ill 2d 574, 119 Ill Dec 397, 522 NE2d 1256 (by implication); People v Slaughter (2d

(2) SHOW OF RELEVANCE, MATERIALITY, AND COMPETENCY [§§ 457-460]

§ 457. Generally

Offers of proof must consist of relevant proof,²³ though not so broad as to embrace irrelevant and immaterial matter, and must be made in good faith.²⁴ It is also necessary that the trial court know whether the offered evidence would have been any more relevant or material than any other evidence adduced at trial.²⁵

If objection to an offer of proof is made, the trial court is bound to ascertain whether the evidence offered is material and relevant before it is received.²⁶ But, it has been stated that, since questions of materiality and relevancy have no effect on what can be preserved for purposes of the appellate record, a relevancy analysis is solely applicable to what is to be admitted into evidence and should not bar an offer of proof.²⁷

A trial court may properly exclude an offer of proof where such offer does not make clear the relationship between the proof offered and the specific testimony sought to be rebutted thereby.²⁸ It is not an abuse of discretion for the trial court to reject an offer of proof which is cumulative of other evidence,²⁹ or which relates to collateral matters such that confusion of issues and delay would result.³⁰ Where an offer of evidence is inadequate to support the tendered inference, it is irrelevant.³¹

§ 458. Burden of showing relevance, materiality, and competency

The burden of showing that proposed evidence is material and that exclusion of the evidence would have a prejudicial effect on the verdict is on the

Dist) 55 Ill App 3d 973, 13 Ill Dec 731, 371 NE2d 666; Gary Surdyke Yamaha, Inc. v Donelson (Mo App) 743 SW2d 522.

23. Ivy v Wal-Mart Stores, Inc. (Mo App) 777 SW2d 682; Cowan v Perryman (Mo App) 740 SW2d 303.

As to rules of admissibility and the relevancy, materiality, and competency of evidence, see 29 Am Jur 2d, Evidence §§ 249 et seq.

24. Central P.R. Co. v California, 162 US 91, 40 L Ed 903, 16 S Ct 766; Godefroy v Hupp, 93 Wash 371, 160 P 1056.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 §§ 9, 13, 14.

25. People v Slaughter (2d Dist) 55 Ill App 3d 973, 13 Ill Dec 731, 371 NE2d 666.

26. Blakemore v State, 268 Ark 145, 594 SW2d 231 (possible relevance of proof was outweighed by confusion of issues and delay that would have resulted from exploration of collateral matters); People v Slaughter (2d Dist) 55 Ill App 3d 973, 13 Ill Dec 731, 371 NE2d 666; Richmond v Warren Institution for Sav., 307 Mass 483, 30 NE2d 407, 132 ALR 859; Lohsen v Lawson, 106 Vt 481, 174 A 861, 95 ALR 309.

In action brought on promissory note, in which defendant contended that trial court erroneously excluded evidence of employment relationship of parties and that such evidence was essential to defendant's proof that note was fraudulently induced, the court properly rejected defendant's offer of proof where such evidence would have gone to a nonpleaded issue. Duncan v Price (Mo App) 620 SW2d 70.

Annotations: 89 ALR2d 279 § 14[a].

27. § 458.

28. United States v Fosher (CA1 Mass) 590 F2d 381, 3 Fed Rules Evid Serv 552.

29. People v Brown (1st Dist) 89 Ill App 3d 852, 45 Ill Dec 229, 412 NE2d 580.

A trial court may refuse an offer of proof which purported to do no more than elicit testimony that was already included in depositions submitted into evidence. Hilton v Nelsen (Minn) 283 NW2d 877.

30. Blakemore v State, 268 Ark 145, 594 SW2d 231.

31. Milenkovic v State (App) 86 Wis 2d 272, 272 NW2d 320.

party making the offer of proof³² which must show its relevancy, materiality, and competency.³³

§ 459. Offer of irrelevant, immaterial, or incompetent evidence

Generally, an offer of evidence which embraces irrelevant and prejudicial matter may be rejected as a whole.³⁴ For instance, when a party offers proof including many different propositions grouped together and a part is incompetent, irrelevant, or immaterial, the court may reject the entire offer if no separate offer is made of such part of the evidence as is admissible.³⁵ But it has been held that a trial court errs in refusing counsel's offer of proof on grounds of irrelevancy and immateriality, since questions of materiality and relevancy have no effect on what can be preserved for purposes of the

32. *Atlanta Paint & Coatings, Inc. v Conti*, 119 RI 522, 381 A2d 1034.

It is the obligation of a party to bring to the attention of the trial court its position as to the relevancy of evidence offered and such position should be included in the offer of proof. *Frein v Madesco Invest. Corp.* (Mo App) 735 SW2d 760.

33. *Ensor v Wilson* (Ala) 519 So 2d 1244, 82 ALR4th 925, reh den (Ala) 537 So 2d 66; *Hendrix v Byers Bldg. Supply, Inc.*, 167 Ga App 878, 307 SE2d 759; *Hilton v Nelsen* (Minn) 283 NW2d 877; *Cowan v Perryman* (Mo App) 740 SW2d 303; *State ex rel. Casey's General Stores, Inc. v Louisiana* (Mo App) 734 SW2d 890; *Williams v John Hancock Mut. Life Ins. Co.* (Mo App) 718 SW2d 611; *State v Herrera* (App) 92 NM 7, 582 P2d 384, cert den 91 NM 751, 580 P2d 972; *Dale v See*, 51 NJL 378, 18 A 306; *Chambers v Minneapolis, S.P. & S.S.M.R. Co.*, 37 ND 377, 163 NW 824; *Commonwealth v Gibson*, 264 Pa Super 548, 400 A2d 221; *Jones v Clark* (Wyo) 418 P2d 792.

An offer of proof in homicide prosecution was adequate where defendant sought to tell jury that he had been attacked with a knife before and show it numerous scars, a matter relevant as to whether defendant reasonably and honestly believed that deadly force was necessary to prevent death or great bodily injury to himself. *Daniels v State*, 248 Ga 591, 285 SE2d 516, on remand 161 Ga App 200, 289 SE2d 825, later app 165 Ga App 397, 299 SE2d 746.

Where plaintiff's counsel upon offer of proof responded to judge that he did not know what his client's answer would be to question asked, there was no way for court to determine that testimony was material and offer was properly rejected. *Thompson v Hill*, 143 Ga App 272, 238 SE2d 271.

34. *People ex rel. Fahner v Hedrich* (2d Dist) 108 Ill App 3d 83, 63 Ill Dec 782, 438 NE2d 924; *People v Robinson* (5th Dist) 56 Ill App 3d 832, 14 Ill Dec 117, 371 NE2d 1170 (dis-

agreed with on other grounds by *People v Wolski* (2d Dist) 83 Ill App 3d 17, 38 Ill Dec 297, 403 NE2d 528, cert den 450 US 915, 67 L Ed 2d 339, 101 S Ct 1356; *Hahn v Ford Motor Co.* (Ind App) 434 NE2d 943, 33 UCCRS 1277; *Busch v Busch Constr., Inc.* (Minn) 262 NW2d 377; *State v McLachlan* (Mo) 283 SW2d 487; *Morris v E.I. Du Pont de Nemours & Co.*, 346 Mo 126, 139 SW2d 984, 129 ALR 352; *Re Drew* (Mo App) 637 SW2d 772; *V. Zappala & Co. v Pyramid Co. of Glens Falls* (3d Dept) 81 App Div 2d 983, 439 NYS2d 765, 31 UCCRS 550; *Donavant v Hudspeth*, 318 NC 1, 347 SE2d 797; *Powers v Martinson* (ND) 313 NW2d 720; *Morey v Redifer*, 204 Or 197, 282 P2d 1062; *Paul v Drown*, 108 Vt 458, 189 A 144, 109 ALR 1085; *Lohsen v Lawson*, 106 Vt 481, 174 A 861, 95 ALR 309.

The trial court did not err in rejecting plaintiff's whole offer of proof relating to plaintiff's prior consistent statements in pretrial deposition where counsel did not specify which questions and answers in deposition he considered admissible. *Williamson v Epperson* (Mo App) 529 SW2d 25.

The trial court properly excluded an exhibit which contained statements made out of court which were hearsay, which was identified but never proven to be a business record and never offered for the limited purpose of showing the complaint only and not the truth of the matter. *Group Medical & Surgical Service, Inc. v Leong* (Tex App El Paso) 750 SW2d 791, writ den (Oct 26, 1988) and reh of writ of error overr (Nov 30, 1988).

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 § 12[a].

35. *Bates v Brooks*, 222 Iowa 1128, 270 NW 867, 109 ALR 1371; *Wilson Storage & Transfer Co. v Geurkink*, 242 Minn 60, 64 NW2d 9, 48 ALR2d 223; *Morris v E.I. Du Pont de Nemours & Co.*, 346 Mo 126, 139 SW2d 984, 129 ALR 352; *Garneau v Garneau*, 63 RI 416, 9 A2d 15, 131 ALR 450.

Annotations: 89 ALR2d 279 § 12.

appellate record, and that a relevancy analysis is solely applicable to what is to be admitted into evidence.³⁶

The court is under no duty in such case to separate the good from the bad, to permit the introduction of that which is competent, and to exclude that which is incompetent.³⁷ But, if evidence received later makes the offered evidence admissible, the offer should be renewed.³⁸

The mere making of an offer of proof which is palpably inadmissible may constitute misconduct where the matter is so left that the jury may infer that the facts stated are true,³⁹ but the mere fact that an offer of competent evidence contains improper matter does not necessarily constitute prejudicial error.⁴⁰

An offer of proof, as distinguished from a tender of evidence, does not constitute evidence that would support the finding of fact where it is incompetent,⁴¹ and it is not error for the trial court to reject an offer of proof which does not disclose that the evidence offered is competent evidence.⁴²

§ 460. —Effect of proof of connecting facts

An offer to prove facts, which require other connecting proof, is inadmissible unless there is also an offer to prove the connection.⁴³

36. *Spence v State* (Tex Crim) 758 SW2d 597, later app (Tex Crim) 795 SW2d 743, reh den (Sep 19, 1990) and cert den (US) 113 L Ed 2d 271, 111 S Ct 1339.

37. *Allen v Travelers' Protective Ass'n*, 163 Iowa 217, 143 NW 574; *Commonwealth v Shooshanian*, 210 Mass 123, 96 NE 70; *Hunter v Bremer*, 256 Pa 257, 100 A 809.

38. *Shepard v Alden*, 161 Minn 135, 201 NW 537, 39 ALR 1094, adhered to 161 Minn 141, 202 NW 71, 39 ALR 1098.

39. *Jones v President, etc., of Portland*, 88 Mich 598, 50 NW 731; *Raefeldt v Koenig*, 152 Wis 459, 140 NW 56.

As to what constitutes misconduct of counsel at trial, generally, see § 502.

40. *Skaggs v State*, 88 Ark 62, 113 SW 346.

41. *Tisco Intermountain & State Ins. Fund v Industrial Com.* (Utah) 744 P2d 1340, 66 Utah Adv Rep 36.

42. *Renner v Wolverton* (Mo) 273 SW2d 325; *Zubrod v Kuhn*, 357 Pa 200, 53 A2d 604; *State v Cunningham*, 51 Wash 2d 502, 319 P2d 847.

Annotations: 89 ALR2d 279 § 8.

43. *Lewis, Hubbard & Co. v Montgomery Supply Co.*, 59 W Va 75, 52 SE 1017.

In a rape prosecution, the trial court did not err in refusing to permit defense counsel to examine complainant regarding the charges of rape she had assertedly brought against others in past and later dropped, where counsel's

offer of proof failed to include any documentation to prove that complainant had in fact filed any such charges and failed to present factual circumstances surrounding the asserted incidents. *People v Ellison* (5th Dist) 89 Ill App 3d 1, 44 Ill Dec 381, 411 NE2d 350.

Trial court in robbery prosecution properly excluded evidence of victim's involvement in alcoholic rehabilitation program, for purposes of impeaching his credibility, where defendant's offer of proof failed to show such evidence to be foundation for expert testimony on long-term effects of alcoholism; absent such expert commentary, foundation evidence was of weak probative force. *State v Flaherty* (Me) 394 A2d 1176.

In a rape prosecution, an offer of proof that a 16-year-old, slightly retarded female victim's "passive acceptance of an older man's sexual advances on a prior occasion infers passive acceptance of the alleged sexual intercourse with the defendant" was properly rejected as highly speculative absent an offer of scientific proof for the proposition that child incest victims tend in adult life to submit passively to sexual advances of older men. *State v Bray*, 23 Wash App 117, 594 P2d 1363.

An offer of proof that a victim's motive in accusing defendant of rape was to provide justification for having contracted venereal disease was fatally defective where there was no offer to prove that prosecutrix's boyfriend did not know before alleged rape that she had gonorrhea. *Milenkovic v State* (App) 86 Wis 2d 272, 272 NW2d 320.

■■■■ Observation: When evidence is contingently admitted, subject to subsequent “connecting up,” certain follow-up formalities apply.⁴⁴ *

If evidence offered at the trial of a case is *prima facie* inadmissible, that is, does not show itself to be relevant, material, or competent, but its relevancy or competency depends upon other evidence being given to establish it—the party offering the proof must show what he expects to prove and the relevancy and materiality of the evidence offered by connecting it with other facts and circumstances.⁴⁵ However, proof offered cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue, and it is enough if it is an appropriate link in the chain of proof.⁴⁶

■■■■ Caution: When counsel has promised to connect up evidence to make it admissible, and thereafter fails to do so, opposing counsel must move to strike the unconnected and therefore inadmissible evidence, or the point is waived.⁴⁷

D. MOTION TO STRIKE EVIDENCE [§§ 461–482]

Research References

ALR Digest to 3d, 4th, and Federal, Appeal and Error §§ 311-323, 370, 371; Criminal Law §§ 151, 152; Trial §§ 26-31

Index to Annotations, Appeal and Error; Evidence; Trial

23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 72, 73

9 Federal Procedure, L Ed, Criminal Procedure § 22:576; 12 Federal Procedure, L Ed, Evidence §§ 33:20-33:24

16 Am Jur Trials 471, Defense of Medical Malpractice Cases § 116

Carlson, Successful Techniques for Civil Trial (1983), § 2:27

Danner & Toothman, Trial Practice Checklists (1989), §§ 8:170, 8:250

Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) § 19.14

1. PURPOSE [§§ 461–464]

§ 461. Purge of inadmissible and incompetent evidence from record

A motion to strike testimony from the record is a form of objection,⁴⁸ with the purpose of purging incompetent evidence,⁴⁹ whether a document,⁵⁰ an

44. Practice References: Making the record. Carlson, Successful Techniques for Civil Trial (1983), § 2.32.

45. Washington Nat. Ins. Co. v Meeks, 249 Ark 73, 458 SW2d 135, later app 252 Ark 1178, 482 SW2d 618; Carroll v Beavers, 126 Cal App 2d 828, 273 P2d 56, 59 ALR2d 263.

When a party seeks to introduce evidence which does not appear to be relevant or competent, or propounds to his witness an interrogatory which appears to call for an irrelevant or incompetent answer, he should make a formal offer of proof showing what testimony he proposes to adduce, and, when necessary, his intention to prove other facts which will render the evidence relevant or competent. Dale v See, 51 NJL 378, 18 A 306; Chambers v Min-

neapolis, S.P. & S.S.M.R. Co., 37 ND 377, 163 NW 824; Jones v Clark (Wyo) 418 P2d 792.

46. McCandless v United States, 298 US 342, 80 L Ed 1205, 56 S Ct 764.

Annotations: Comment Note.—Ruling on offer of proof as error, 89 ALR2d 279 § 13.

47. § 474.

48. § 410.

49. Schrantz v Luancing, 218 NJ Super 434, 527 A2d 967.

50. Crawford v United States, 212 US 183, 53 L Ed 465, 29 S Ct 260 (inadmissible letter); Re Marriage of Hazard (1st Dist) 167 Ill App 3d 61, 117 Ill Dec 770, 520 NE2d 1121 (hearsay portions of caseworker's report); Roberts v

exhibit,⁵¹ or testimony.⁵² Also like an objection,⁵³ a motion to strike is intended to enable the trial court to make an informed decision and give the opposing party an opportunity to correct any defect in the proffered evidence.⁵⁴

Error in admitting evidence is frequently cured by striking out the evidence⁵⁵ from the consideration of the jury.⁵⁶ Testimony which has no probative value but may prejudice a party should be stricken.⁵⁷

If the court in sustaining an objection to a question has not directed the jury not to consider the reply given, a motion to strike is essential to the proper elimination of the reply from the trial record.⁵⁸

On motion to strike a plaintiff's evidence, all inferences which a jury might fairly draw therefrom must be drawn in his favor, and where there are several inferences which may be drawn from the evidence, although they may differ in degree of probability, the court must adopt those most favorable to the plaintiff unless they are strained, forced, or contrary to reason.⁵⁹

§ 462. Preservation of right of review

A motion to strike out is essential to preserve the error for review where evidence has been given before any objection has been made.⁶⁰ Unless there is a motion to strike a witness's answer, a reviewing court cannot reach a claim of error.⁶¹ However, the absence of a motion to strike will not preclude the

Roberts, 299 SC 315, 384 SE2d 719 (copy of deposit slip).

It was error to permit prosecutor, in closing argument, to read passage from Supreme Court's opinion quoting medical-legal textbook concerning amnesia and crimes. *State v Austin*, 320 NC 276, 357 SE2d 641, cert den 484 US 916, 98 L Ed 2d 224, 108 S Ct 267 (harmless error where evidence of defendant's guilt was overwhelming).

51. *Woolwine v Furr's, Inc.* (App) 106 NM 492, 745 P2d 717.

As to introduction of documentary evidence, including exhibits, generally, see §§ 345 et seq.

52. § 465.

53. § 395.

54. *Stanley v De Cesere* (Me) 540 A2d 767.

55. *Peek v United States* (CA9 Wash) 321 F2d 934, 5 ALR3d 802, cert den 376 US 954, 11 L Ed 2d 973, 84 S Ct 973 and (disagreed with on other grounds by *United States v Tsinnijinnie* (CA9 Ariz) 601 F2d 1035, cert den 445 US 966, 64 L Ed 2d 242, 100 S Ct 1657); *Kinsey v State*, 49 Ariz 201, 65 P2d 1141, 125 ALR 3; *Wray v Ferris*, 187 Okla 428, 103 P2d 942, 128 ALR 1079; *Welch v Creech*, 88 Wash 429, 153 P 355.

56. *Jacksonville, T. & K.W.R. Co. v Peninsular Land, Transp. & Mfg. Co.*, 27 Fla 1, 9 So 661, reh den 27 Fla 157, 9 So 689; *Conroy v Fall River Herald News Pub. Co.*, 306 Mass 488, 28 NE2d 729, 132 ALR 927.

57. *Curry v United States* (Dist Col App) 520 A2d 255.

58. *Hackenson v Waterbury*, 124 Conn 679, 2 A2d 215; *Wightman v Campbell*, 217 NY 479, 112 NE 184; *Sorenson v Smith*, 65 Or 78, 129 P 757, adhered to 65 Or 91, 131 P 1022.

As to the prudence of requesting a cautionary instruction, generally, see § 466.

59. *Staples v Spence*, 179 Va 359, 19 SE2d 69, 140 ALR 527.

60. *T. Barbour Brown & Co. v Canty*, 115 Conn 226, 161 A 91, 83 ALR 801; *Hangen v Hachemeister*, 114 NY 566, 21 NE 1046; *Thornhill v Davis*, 121 SC 49, 113 SE 370, 24 ALR 617; *Federal Underwriters Exchange v Tubbe* (Tex Civ App) 193 SW2d 563, writ ref n r e.

61. *Mosesian v Pennwalt Corp.* (5th Dist) 191 Cal App 3d 851, 236 Cal Rptr 778; *Ashland v Hoffarth*, 84 Or App 265, 733 P2d 925, review den 303 Or 483, 737 P2d 1249.

As to the necessity and effect of an objection in addition to a motion to strike, see § 469.

For discussion of motions in limine to exclude evidence, see §§ 94 et seq.

As to motions to suppress evidence under the Federal Rules of Criminal Procedure, see 9 Federal Procedure, L Ed, Criminal Procedure § 22:576.

Annotations: Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311.

granting of a new trial when highly prejudicial evidence which should have been stricken was admitted and emphasized in the judge's charge to the jury.⁶²

§ 463. —Prejudicial error

The rules governing a determination of prejudicial error in the striking out of evidence or testimony are the same as those governing the admission or exclusion of evidence.⁶³ The general principle that in order to warrant a reversal, the error must have been prejudicial to some substantial right of the appellant, applies to rulings of the trial court on matters relating to striking out unresponsive answers.⁶⁴

Unless it is prejudicial, an error in striking out⁶⁵ or in refusal to strike out evidence is not a ground for reversal.⁶⁶

§ 464. —Factors considered

Factors significant in determining prejudice include the existence of proof by other witnesses,⁶⁷ sufficient other evidence,⁶⁸ the materiality⁶⁹ and relevancy

62. *State v Beam*, 45 NC App 82, 262 SE2d 350.

63. *Chicago, M. & St. P.R. Co. v Westby* (CA8 SD) 178 F 619; *Boggs v Bodkin*, 32 W Va 566, 9 SE 891.

The erroneous ruling of a state trial court that excluded evidence central to a criminal defendant's claim of innocence, relating to the physical and psychological environment in which his confession was obtained, is subject to harmless-error analysis even though the ruling violates the defendant's constitutional right to present a complete defense, where it is contended that the very evidence excluded by the ruling ultimately came in through other witnesses. *Crane v Kentucky*, 476 US 683, 90 L Ed 2d 636, 106 S Ct 2142, 20 Fed Rules Evid Serv 801, on remand (Ky) 726 SW2d 302, cert den 484 US 834, 98 L Ed 2d 70, 108 S Ct 111, habeas corpus proceeding (WD Ky) 708 F Supp 163, affd (CA6 Ky) 889 F2d 715, cert den (US) 107 L Ed 2d 1070, 110 S Ct 1168.

As to rules of admissibility and the relevancy, materiality, and competency of evidence, see 29 Am Jur 2d, Evidence §§ 249 et seq.

64. *People v Turner*, 260 Ill 84, 102 NE 1036.

As to the required showing, on appeal, of prejudice by a single error, see 5 Am Jur 2d, Appeal and Error § 789.

65. *Chicago, M. & St. P.R. Co. v Westby* (CA8 SD) 178 F 619; *Boggs v Bodkin*, 32 W Va 566, 9 SE 891.

An error in the exclusion of evidence does not require reversal where there is no prejudice or where the evidence would not have materially affected the result in the case. *Connelly v General Motors Corp.* (1st Dist) 184 Ill App 3d 378, 132 Ill Dec 630, 540 NE2d 370, app den (Ill) 136 Ill Dec 582, 545 NE2d 106.

66. *Beresford v Pacific Gas & Electric Co.*, 45

Cal 2d 738, 290 P2d 498, 54 ALR2d 910; *State v John*, 210 Conn 652, 557 A2d 93, cert den (US) 107 L Ed 2d 50, 110 S Ct 84; *Moeller v Hauser*, 237 Minn 368, 54 NW2d 639, 57 ALR2d 364; *Anderson v Asphalt Distributing Co. (Mo)* 55 SW2d 688, 86 ALR 1033.

67. *Beresford v Pacific Gas & Electric Co.*, 45 Cal 2d 738, 290 P2d 498, 54 ALR2d 910; *Atwood v Atwood*, 84 Conn 169, 79 A 59.

68. *Riley v Martinelli*, 97 Cal 575, 32 P 579; *Brocke v Naseath* (3rd Dist) 134 Cal App 2d 23, 285 P2d 291, 51 ALR2d 1083; *Kuiken v Garrett*, 243 Iowa 785, 51 NW2d 149, 41 ALR2d 1397; *Buttz v Bergeson* (Minn App) 392 NW2d 917; *McGregor v Harm*, 19 ND 599, 125 NW 885; *State v Garver*, 190 Or 291, 225 P2d 771, 27 ALR2d 105.

The trial court's exclusion of a contract, offered as relevant to the issue of the appellants' knowledge of the risks and dangers and to the issue of assumption of those risks by eliminating the testing service contained in the contract, did not prejudice, in an action by a store against the alarm company for losses sustained in a burglary when the alarm malfunctioned, the store where evidence of the store's knowledge and assumption of the risks associated with the nonfunctioning alarm system were otherwise presented in evidence. *Collins & Sons Fine Jewelry, Inc. v Carolina Safety Systems, Inc.* (App) 296 SC 219, 371 SE2d 539.

69. *Chicago, M. & St. P.R. Co. v Westby* (CA8 SD) 178 F 619; *Chicago C.R. Co. v Saxby*, 213 Ill 274, 72 NE 755; *Connelly v General Motors Corp.* (1st Dist) 184 Ill App 3d 378, 132 Ill Dec 630, 540 NE2d 370, app den (Ill) 136 Ill Dec 582, 545 NE2d 106; *State v Cerciello*, 86 NJL 309, 90 A 1112.

of the evidence,⁷⁰ and the probability of its admission or exclusion affecting the result.⁷¹

If no objection was made at the time evidence was being introduced, the ruling of the trial court on a subsequent motion to strike it out, in order to constitute reversible error, must be so prejudicial as to be judicially seen and felt.⁷²

2. NECESSITY OF MOTION TO STRIKE [§§ 465-476]

a. IN GENERAL [§§ 465-469]

§ 465. Remedy for improper, incompetent, or unresponsive testimony

A motion to strike the evidence is the appropriate procedure where a witness answers, after an objection to the question propounded to him is sustained, or where the witness, in response to a proper question, gives an incompetent or unresponsive answer, and there was no opportunity to object previously because the question did not indicate the nature of the answer.⁷³ However, a prosecution witness's invocation of the Fifth Amendment right against self-incrimination during cross-examination does not per se violate a defendant's right to confront the witnesses against him and requires striking of that testimony, where the privilege has been invoked as to purely collateral matters, such as the credibility of the witness.⁷⁴

Practice guide: Striking all of the testimony of a witness may be the only appropriate remedy when refusal to answer the questions of the cross-examination frustrates the purpose of the process of cross-examination, that is, to test the credibility of the witness and the truthfulness of his testimony.⁷⁵

70. *Jones v State*, 64 Fla 92, 59 So 892.

The trial court improperly denied the defendant's motion to strike the rebuttal testimony of a witness, to establish that he had been asked by the defendant to speak to the complainant about dropping the charges against the defendant, where the rebuttal witness denied that the defendant had approached him with that request and, thus, his testimony did not connect the defendant to any attempt to influence the complainant and should have been stricken upon defense counsel's request. *People v Upshaw* (2d Dept) 138 App Div 2d 761, 526 NYS2d 575.

71. *Lineman v Schmid*, 32 Cal 2d 204, 195 P2d 408, 4 ALR2d 1380.

72. *Glatstein v Grund*, 243 Iowa 541, 51 NW2d 162, 36 ALR2d 531; *Anderson v Asphalt Distributing Co.* (Mo) 55 SW2d 688, 86 ALR 1033.

As to the necessity and effect of an objection in addition to a motion to strike, see § 470.

73. *Cole v State* (Ala App) 548 So 2d 1093 (unresponsive answer); *Jimenez v State*, 24 Ark App 76, 749 SW2d 331, post-conviction proceeding (Ark) 1988 Ark LEXIS 455 (unrepon-

sive answer); *People v Lawrence*, 143 Cal 148, 76 P 893; *Supple v Suffolk Sav. Bank*, 198 Mass 393, 84 NE 432; *Beal v Southern Union Gas Co.*, 66 NM 424, 349 P2d 337, 84 ALR2d 1269; *Parsons v New York C. & H.R.R. Co.*, 113 NY 355, 21 NE 145; *Silver v State*, 110 Tex Crim 512, 8 SW2d 144, 60 ALR 290, application den 110 Tex Crim 521, 9 SW2d 358, 60 ALR 297; *Bigelow v Sickles*, 80 Wis 98, 49 NW 106.

As to the distinction between objectionable questions and answers, see § 403.

74. *State v Sidebottom* (Mo) 753 SW2d 915, cert den 488 US 975, 102 L Ed 2d 550, 109 S Ct 515, post-conviction proceeding (Mo) 781 SW2d 791, cert den (US) 111 L Ed 2d 804, 110 S Ct 3295, reh den (US) 111 L Ed 2d 822, 111 S Ct 6.

75. *Lawson v Murray* (CA4 Va) 837 F2d 653, 24 Fed Rules Evid Serv 870, cert den 488 US 831, 102 L Ed 2d 63, 109 S Ct 87; *Robertson v State*, 298 Ark 131, 765 SW2d 936, later app 304 Ark 332, 802 SW2d 920.

In a prosecution for indecent assault and battery on a child under the age of 14, where the alleged victim is unresponsive and uncoop-

Where a witness answers after an objection to the question propounded to him, it is counsel's duty to request that the record reflect the objection as preceding the answer.⁷⁶

■■■■ Recommendation: If counsel is tardy with an objection, opposing counsel should not simply object after the answer is in. The objection should generally be coupled with a motion to strike, and an admonishing instruction should be requested from the court directing the jury to disregard the answer.⁷⁷

§ 466. —Request for cautionary instruction

A motion to strike should be made where a witness answers a question before an attorney can object, unless the court directs the jury not to consider the answer.⁷⁸ When the unresponsive testimony by a witness is stricken, the jury should be instructed to disregard it, so that any prejudice to the defendant is eradicated.⁷⁹

Where the jury has heard excluded evidence, despite a sustained objection, objecting counsel should ask the trial judge for a cautionary instruction,⁸⁰ because unless the jury is specifically instructed to disregard such testimony,⁸¹ and even where it is,⁸² striking the evidence does not always cure the error in admitting it.⁸³

If the court in sustaining an objection to a question has not directed the jury not to consider the reply given, a motion to strike it out is essential to the proper elimination of the reply.⁸⁴

erative during cross-examination, thus permitting the defendant no meaningful right of cross-examination, although defendant may seek a mistrial because of the witness's non-cooperation, the better practice is to move to strike the testimony or seek reconsideration of the court's ruling that the child witness was competent to testify. *Commonwealth v Kirouac*, 405 Mass 557, 542 NE2d 270.

As to a motion to strike the evidence in part, see § 468.

76. *Kuiken v Garrett*, 243 Iowa 785, 51 NW2d 149, 41 ALR2d 1397.

For practical suggestions respecting the making a complete record, generally, see § 439.

77. Practice References: Carlson, *Successful Techniques for Civil Trial* (1983) § 2:29.

As to cautionary instructions with a motion to strike, see § 466.

78. *Lavieri v Ulysses*, 149 Conn 396, 180 A2d 632, 98 ALR2d 1096; *Wightman v Campbell*, 217 NY 479, 112 NE 184; *Sorenson v Smith*, 65 Or 78, 129 P 757, adhered to 65 Or 91, 131 P 1022.

Defendant was not prejudiced because the jury heard testimony which was stricken by the court upon motion, where the court instructed the jury at the beginning of the trial not to

consider the answer of a witness when a motion to strike was allowed and referred to this instruction when the motions to strike were allowed, although the better procedure is to give the instruction to disregard the answer immediately after allowing the motion to strike. *State v Franks*, 300 NC 1, 265 SE2d 177.

79. *Cole v State* (Ala App) 548 So 2d 1093.

80. *Jimenez v State*, 24 Ark App 76, 749 SW2d 331, post-conviction proceeding (Ark) 1988 Ark LEXIS 455; *State v Sanford* (Mo App) 772 SW2d 806.

As to cautionary instructions, generally, see §§ 1213 et seq.; as to mistrial, and grounds therefor, see §§ 1706 et seq.

81. *Crossler v Safeway Stores, Inc.*, 51 Idaho 413, 6 P2d 151, 80 ALR 463.

82. *Birch v Abercrombie*, 74 Wash 486, 133 P 1020, mod and reh den (Wash) 135 P 821.

83. *Rogers v State*, 60 Ark 76, 29 SW 894; *Foster v Shepherd*, 258 Ill 164, 101 NE 411 (ovrld on other grounds by *Spiegel's House Furnishing Co. v Industrial Com.*, 288 Ill 422, 123 NE 606, 6 ALR 540); *Birch v Abercrombie*, 74 Wash 486, 133 P 1020, mod and reh den (Wash) 135 P 821.

84. § 465.

In some cases, a cautionary instruction may effectively suffice as a motion to strike.⁸⁵

§ 467. —Request for mistrial

Where the jury has heard excluded evidence, despite a sustained objection, in cases of extreme prejudice to the party, counsel should ask the court to declare a mistrial.⁸⁶

■■■■ Recommendation: Anytime the information is serious and damaging, especially if it appears to have been volunteered by the witness in bad faith, counsel should consider requesting the court to declare a mistrial.⁸⁷

A mistrial does not serve the same function as a mere objection or motion to strike and is not ordinarily used to indicate an erroneous ruling of law.⁸⁸ Thus, where a party makes no motion to strike and moves for mistrial, the motion for a mistrial does not include either a motion to strike out or to exclude testimony as a lesser prayer for relief.⁸⁹

§ 468. Motion to strike evidence in part

Where it becomes apparent that only some feature or part of a witness's answer is objectionable, the remedy is a motion to strike the answer's objectionable parts.⁹⁰ But, where an answer is such that to strike out the improper part of it would make the witness testify to something which he did not intend, all of it should be stricken.⁹¹ The same result obtains where on cross-examination it appears that a witness's opinion is based in part on improper elements.⁹²

A motion to strike the whole is properly denied where the evidence is partly competent.⁹³

§ 469. Motion of court to strike evidence

A trial court may properly strike, sua sponte, an improper question and its

85. *Stumpf v State* (Alaska App) 749 P2d 880, cert den 490 US 1070, 104 L Ed 2d 639, 109 S Ct 2075 (once testimony has come into evidence, the trial court's instruction admonishing the jury that the witness's hearsay testimony did not establish the truth of what she attested to, should have been as effective as a motion to strike).

86. *State v Sanford* (Mo App) 772 SW2d 806.

The trial court improperly denied the defense motion to strike evidence, where the record showed that prior to the taking of the testimony, the defense counsel timely moved to strike or exclude the evidence of any criminal activity other than that charged in the information, and that at the end of the trial, he unsuccessfully moved for a mistrial on grounds which, while clumsily expressed, were sufficient. *Malcolm v State* (Fla App D3) 415 So 2d 891.

As to cautionary instructions, generally, see § 1213; as to mistrial, and grounds therefor, see §§ 1706 et seq.

For discussion of motions for mistrial in civil and criminal cases, see §§ 1706 et seq.

Practice References: *Danner & Toothman, Trial Practice Checklists* (1989), §§ 8:170, 8:250.

87. **Practice References:** *Carlson, Successful Techniques for Civil Trial* (1983), § 2:29.

88. *Cole v State* (Ala App) 548 So 2d 1093.

89. *Cole v State* (Ala App) 548 So 2d 1093.

90. *Jimenez v State*, 24 Ark App 76, 749 SW2d 331, post-conviction proceeding (Ark) 1988 Ark LEXIS 455; *State v Beam*, 45 NC App 82, 262 SE2d 350.

As to the requisite specificity of grounds for a motion to strike evidence in part, see § 468.

91. *Atlanta & F.R. Co. v Kimberly*, 87 Ga 161, 13 SE 277.

92. *State by State Highway Com. v Dumas*, 238 Or 449, 395 P2d 424.

93. § 482.

response,⁹⁴ although it has been held that evidence received can be stricken only as a matter of right, and not at the discretion of the court.⁹⁵

A statute requiring the court to deny a motion for a directed verdict where the adverse party objects thereto, and to submit the issue or issues to the jury, does not deprive the court of the power to strike out immaterial evidence, nor require it to submit to the jury questions having no bearing on the outcome of the suit.⁹⁶

The trial court will not be put in error for failing to strike or exclude testimony subject to eradication in the absence of a request therefore by the defendant.⁹⁷

b. REQUIREMENT OF OBJECTION [§§ 470, 471]

§ 470. Generally; discretion of court

Although it has been held that unless a seasonable objection is made, the party cannot avail himself of a motion to strike the evidence,⁹⁸ a motion to strike testimony from the record is a form of objection, and can serve as a late or a renewed objection.⁹⁹

Motions to strike the answer elicited by a question to which no objection was made are often allowed when the answer is not responsive to the question and contains prejudicial testimony of a fact concerning which the objecting party was not put on notice.¹

When no timely objection is interposed to an incompetent question, a motion to strike the answer is addressed to the trial judge's discretion and his ruling is not subject to review in the absence of abuse.²

There may be cases where a refusal to strike out evidence received without

94. *American Workmen v Ledden*, 196 Ark 902, 120 SW2d 346, 120 ALR 201; *Mattox v State*, 185 Ga App 787, 366 SE2d 158.

Where evidence which is apparently incompetent or not the best evidence is received conditionally on the assurance of counsel that he will supply the necessary foundation, which he fails to do, the court should exclude the evidence on its own motion. *Pittman v State*, 51 Fla 94, 41 So 385.

As to effect of a failure to object on the court's power and discretion to exclude improper evidence, generally, see § 410.

95. *Souza v Becker*, 302 Mass 28, 18 NE2d 350, 120 ALR 1002; *Hoag v Wright*, 174 NY 36, 66 NE 579; *Smith v White*, 63 W Va 472, 60 SE 404.

96. *Matz v Martinson*, 127 Minn 262, 149 NW 370.

97. *Cole v State* (Ala App) 548 So 2d 1093.

98. *Wicoma Inv. Co. v Pridgeon*, 137 Fla 540, 188 So 597; *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464; *Hickman v Green*, 123 Mo 165, 27 SW 440; *Fredericks v Atlantic Refining Co.*, 282 Pa 8, 127 A 615, 38 ALR 666; *Wadsworth v Manufacturers' Water Co.*, 256 Pa 106, 100 A 577.

The trial court did not err in refusing to grant defense motion to strike, where defense counsel was given ample opportunity to object to the alleged hearsay testimony, and did not do so. *Stumpf v State* (Alaska App) 749 P2d 880, cert den 490 US 1070, 104 L Ed 2d 639, 109 S Ct 2075.

For discussion of what constitutes a timely motion to strike, see § 477.

As to the requirement of contemporaneous objection to the admission or exclusion of evidence, see § 401.

99. *State v Pilkey* (Tenn) 776 SW2d 943, reh den (Tenn) 1989 Tenn LEXIS 426 and cert den (US) 108 L Ed 2d 619, 110 S Ct 1483 and cert den (US) 108 L Ed 2d 646, 110 S Ct 1510.

As to the necessity, generally, to renew or waive an objection, see § 413.

1. *State v Pope*, 287 NC 505, 215 SE2d 139.

2. *Wicoma Inv. Co. v Pridgeon*, 137 Fla 540, 188 So 597; *Patton v Bank of La Fayette*, 124 Ga 965, 53 SE 664; *Glatstein v Grund*, 243 Iowa 541, 51 NW2d 162, 36 ALR2d 531; *State v Pope*, 287 NC 505, 215 SE2d 139; *McPeters v Yeargin Constr. Co.* (App) 290 SC 327, 350 SE2d 208.

objection constitutes an abuse of discretion, as in a criminal case where inexperienced counsel who have been appointed by the court permit evidence to go in, not knowing that it is incompetent,³ or where fundamental due process rights are violated by the admission of evidence whose incompetence was subsequently discovered.⁴

Observation: A motion to suppress is the proper procedure in a criminal action to challenge the admission of evidence allegedly required to be excluded by the United States Constitution.⁵

§ 471. Effect of objection without motion to strike

An answer of a witness to an improper question, even where an objection to the question is sustained immediately after the witness answers, remains in the record unless the objection is followed by a motion to strike.⁶ It has been held, however, that where the court is advised of the nature of the proof sought to be elicited, an objection to the question is sufficient.⁷

c. WAIVER [§§ 472-476]

§ 472. Generally; failure to timely move to strike

Failure to make a timely objection⁸ or a motion to strike inadmissible evidence, constitutes a waiver of the later right to contest its erroneous admission into evidence.⁹ A party waives objection to a witness's unresponsive answer where counsel interposes no motion to strike the answer at the time he objects to it.¹⁰ However, an objection to the admission of testimony, though not characterized as a motion to strike, may have the same effect, so that the issue is not waived simply because the motion was made after the evidence had been introduced.¹¹

If counsel offers evidence of a similar character,¹² or allows obviously

3. *People v Blevins*, 251 Ill 381, 96 NE 214.

4. *Brown v Mississippi*, 297 US 278, 80 L Ed 682, 56 S Ct 461, conformed to (Miss) 167 So 82.

5. *State v Joyner*, 54 NC App 129, 282 SE2d 520, petition den 304 NC 730, 287 SE2d 903.

A defendant may either file a pretrial motion to suppress evidence or wait until the trial on the merits and object when the alleged unlawfully obtained evidence is offered. *Solis v State* (Tex App Waco) 632 SW2d 170.

As to motions to suppress evidence under the Federal Rules of Criminal Procedure, see 9 Federal Procedure, L Ed, Criminal Procedure § 22:576.

6. *Oakes v Peter Pan Bakers, Inc.*, 258 Iowa 447, 138 NW2d 93, 10 ALR3d 247.

For practical considerations in making a complete record, see § 439.

7. *Cromeenes v San Pedro, L.A. & S.L.R. Co.*, 37 Utah 475, 109 P 10.

8. §§ 405 et seq.

9. *Mosesian v Pennwalt Corp.* (5th Dist) 191

Cal App 3d 851, 236 Cal Rptr 778; *Greig v Griffel* (2d Dist) 49 Ill App 3d 829, 7 Ill Dec 499, 364 NE2d 660.

As to timeliness of a motion to strike, see §§ 479 et seq.

Practice References: *Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases* (1990) §§ 14:12, 19:14.

10. *State v Beam*, 45 NC App 82, 262 SE2d 350.

11. *State v Pilkey* (Tenn) 776 SW2d 943, reh den (Tenn) 1989 Tenn LEXIS 426 and cert den (US) 108 L Ed 2d 619, 110 S Ct 1483 and cert den (US) 108 L Ed 2d 646, 110 S Ct 1510.

As to time of motions to strike, generally, see § 477.

12. *T. Barbour Brown & Co. v Canty*, 115 Conn 226, 161 A 91, 83 ALR 801; *Rawle v McIlhenny*, 163 Va 735, 177 SE 214, 98 ALR 930.

As to waiver of grounds for objection, generally, by offering evidence, including evidence of

incompetent evidence to be introduced without making objection, he ordinarily will be deemed to have waived the right to have it stricken,¹³ particularly when the only motion to strike is made after subsequent, similar testimony.¹⁴

§ 473. Failure to specify grounds

Where grounds for a motion to strike are specified, all other grounds not specified are thereby waived.¹⁵

§ 474. Failure to connect conditionally admitted evidence

Evidence, which is contingently admitted subject to subsequent "connecting up" to show its relevance or materiality, requires certain follow-up formalities.¹⁶

■■■■ Observation: Where objection is made to evidence which may be admitted conditionally, the procedure includes the court's reserving its ruling on the objection, or admitting the evidence subject to a later motion to strike. Some judges make, in admitting evidence conditionally over objection, the evidence subject to a motion to strike; others consider the motion as already made; and, others require the objecting party to make the motion to strike later in the trial.¹⁷

Where evidence is introduced subject to objection, and the question of its admissibility is withheld until further proof is made, the objecting party must move at the proper time to have the testimony stricken from the record, and if necessary, to renew the motion,¹⁸ or the objection is waived and issue of its admissibility cannot be considered on appeal.¹⁹ Similarly, where evidence is admitted subject to a motion to strike, failure to make the motion constitutes a waiver.²⁰ Thus, when counsel has promised to connect up evidence to make it admissible, and thereafter fails to do so, opposing counsel must move to strike

the same or similar character, see §§ 418 et seq.

13. *Hickman v Green*, 123 Mo 165, 27 SW 440.

14. *State v Harper*, 82 NC App 398, 346 SE2d 223 (holding that by defendant's failure to move to strike prior to testimony that a sequential breathalyzer test was administered to him, he waived any objection to the chemical analyst's testimony).

15. *St. Louis, I.M. & S.R. Co. v Blaylock*, 117 Ark 504, 175 SW 1170; *Lavieri v Ulysses*, 149 Conn 396, 180 A2d 632, 98 ALR2d 1096.

As to the required specificity of grounds for a motion to strike, generally, see § 479.

16. § 460.

17. § 413.

18. § 476.

19. *T. Barbour Brown & Co. v Canty*, 115 Conn 226, 161 A 91, 83 ALR 801; *Moore v State*, 140 Ga App 824, 232 SE2d 264; *Menardi v Wacker*, 32 Nev 169, 105 P 287.

Where facts are proved which depend on

other facts to give them a bearing on the guilt of an accused, and such other facts are not shown, the remedy of the accused is by motion to strike the admitted evidence. *People v Auerbach*, 176 Mich 23, 141 NW 869.

As to the discretion of the court to conditionally admit evidence, generally, see § 414.

For discussion of proof precedent to the admission of evidence as a factor in the order of proof, see § 362.

Annotations: Necessity and sufficiency of renewal of objection to, or offer of, evidence admitted or excluded conditionally, 88 ALR2d 12 § 12[a].

Practice References: Conditional admission of evidence. 5 Am Jur Trials 505, Mapping the Trial—Order of Proof § 36.

—Eliciting testimony subject to connection. 5 Am Jur Trials 611, Presenting Plaintiff's Case § 25.

20. *Ault v International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986; *Schwartz v Shapiro* (1st Dist) 229 Cal App 2d 238, 40 Cal Rptr 189; *McGee v State*, 121 Ga App 221, 173 SE2d 427.

the unconnected and therefore inadmissible evidence, or the point is waived;²¹ however, in such a case, the court may strike the evidence on its own motion.²²

§ 475. Failure to renew motion

Although the practice of the trial court's holding in abeyance rulings on the evidence has been disapproved,²³ if a ruling on the motion to exclude evidence is postponed until later in the trial, the motion must be renewed or the objection to the admission of the evidence will be deemed to be waived.²⁴

§ 476. —Evidence conditionally admitted

It is the duty of the party seeking to exclude evidence, admitted to the trial conditionally, to renew its objection by moving to strike, if its relevancy is not thereafter established.²⁵

■■■ Observation: Generally, where objection is made to evidence which may be admitted conditionally, the procedure includes the court's reserving its ruling on the objection, or admitting the evidence subject to a later motion to strike. Some judges state, in admitting evidence conditionally over objection make the evidence subject to a motion to strike, that the motion is considered already made; others require the objecting party to make the motion to strike later in the trial.²⁶

The procedure for conditionally admitting evidence subject to a later motion to strike is well within the court's discretion and, finding no abuse of discretion, the court's provisional admission of evidence will be upheld.²⁷

Sometimes a motion to strike can serve as a renewed objection to strike evidence, which had previously been conditionally admitted, when the condition is not later met.²⁸

21. Greig v Griffel (2d Dist) 49 Ill App 3d 829, 7 Ill Dec 499, 364 NE2d 660; Woolwine v Furr's, Inc. (App) 106 NM 492, 745 P2d 717 (exhibit).

As to the burden of the proponent of evidence subject to an objection to show its relevance, materiality, and competency, generally, see § 458.

Annotations: 88 ALR2d 12 § 15.

Practice References: Making the record. Carlson, Successful Techniques for Civil Trial (1983), § 2.32.

22. § 469.

23. Havas v 105 Casino Corp., 82 Nev 282, 417 P2d 239.

A motion to strike out evidence should be acted upon seasonably. Sulkowski v Zynda, 160 Mich 7, 124 NW 536 (in a jury trial a delay of 5 days is impermissible).

24. Torres v State (Alaska) 519 P2d 788; Reed v Bunker, 255 Iowa 322, 122 NW2d 290; Sudbury v Department of Public Utilities, 351

Mass 214, 218 NE2d 415; Jackson v State, 173 Miss 776, 163 So 381, 100 ALR 789; Butler v Crowe (Mo App) 540 SW2d 940; Evans v Heaton, 57 SD 436, 233 NW 281; Norfolk & W. R. Co. v Anderson, 90 Va 1, 17 SE 757.

As to waiver of objection by failure to renew or repeat the objection, see § 413.

Annotations: Necessity and sufficiency of renewal of objection to, or offer of, evidence admitted or excluded conditionally, 88 ALR2d 12 § 17[a].

25. Jacksonville, T. & K.W.R. Co. v Peninsular Land, Transp. & Mfg. Co., 27 Fla 1, 9 So 661, reh den 27 Fla 157, 9 So 689; Woolwine v Furr's, Inc. (App) 106 NM 492, 745 P2d 717 (exhibit).

26. Practice References: Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases (1990) § 14:12.

27. § 325.

28. § 470.

3. TIME OF MOTION TO STRIKE [§§ 477, 478]

§ 477. Generally

A motion to strike must be timely made,²⁹ that is, when the grounds for the motion,³⁰ or, the objectionable character of the testimony, first become apparent,³¹ and should be denied where it is made too late in the trial to make it possible to supply other evidence on the subject.³²

■■■■ *Practice guide:* The risk, in moving to strike the evidence, of accentuating the importance of testimony should be weighed and acted upon without hesitation. Voice tone and demeanor can soften the impact of the motion to strike.³³

■■■■ *Observation:* A motion to strike made after other questions are asked will not relate back to earlier answers which counsel contends should be stricken.³⁴

A motion to strike testimony is too late when made after direct examination,³⁵ cross-examination,³⁶ or redirect examination of a witness,³⁷ after the close of the plaintiff's evidence, rather than at the time the testimony is offered,³⁸ at the close of the defendant's case, when the issues were to be

29. *Benson v United States*, 146 US 325, 36 L Ed 991, 13 S Ct 60; *Wicoma Inv. Co. v Pridgeon*, 137 Fla 540, 188 So 597; *Stanley v De Cesere (Me)* 540 A2d 767.

30. *Wilson v Tobiasen*, 97 Or App 527, 777 P2d 1379, review den 308 Or 500, 784 P2d 441; *Ashland v Hoffarth*, 84 Or App 265, 733 P2d 925, review den 303 Or 483, 737 P2d 1249; *Longtree, Ltd. v Resource Control Int'l, Inc. (Wyo)* 755 P2d 195, 8 UCCRS2d 443.

As to the requirement of contemporaneous objection to the admission or exclusion of evidence, see § 401.

31. *Levin v Welsh Bros. Motor Service, Inc.* (1st Dist) 164 Ill App 3d 640, 115 Ill Dec 680, 518 NE2d 205, app den 119 Ill 2d 558, 119 Ill Dec 387, 522 NE2d 1246; *State v Harper*, 82 NC App 398, 346 SE2d 223.

A motion to strike evidence may be denied where it is premature. *Permian Oil Co. v Smith*, 129 Tex 413, 73 SW2d 490, 111 ALR 1152, reh overr 129 Tex 446, 107 SW2d 564, 111 ALR 1175.

32. *Benson v United States*, 146 US 325, 36 L Ed 991, 13 S Ct 60; *Wicoma Inv. Co. v Pridgeon*, 137 Fla 540, 188 So 597; *State v Sutton*, 231 Neb 30, 434 NW2d 689.

Where, at no time during the testimony of the plaintiff did the defendants object to or move to strike his testimony on the ground that no previous notice was given that the testimony, summarizing a writing, would be given, the trial court did not err in finding that the motion to strike, made 1 day after the

testimony was admitted, was not timely. *Stanley v De Cesere (Me)* 540 A2d 767.

Practice Reference: Delayed motion to strike. 16 Am Jur Trials 471, *Defense of Medical Malpractice Cases* § 116.

33. *Practice References:* Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases* (1990) § 19:14.

34. *State v Beam*, 45 NC App 82, 262 SE2d 350.

35. *Spellman v State (Ala App)* 500 So 2d 110.

36. *Benson v United States*, 146 US 325, 36 L Ed 991, 13 S Ct 60; *Wicoma Inv. Co. v Pridgeon*, 137 Fla 540, 188 So 597.

37. *Wilson v Tobiasen*, 97 Or App 527, 777 P2d 1379, review den 308 Or 500, 784 P2d 441; *Ashland v Hoffarth*, 84 Or App 265, 733 P2d 925, review den 303 Or 483, 737 P2d 1249 (where the ground for objection was disclosed at the latest on cross-examination of the expert, and the defendant did not move to strike the testimony until after redirect examination, it was not error to deny the motion).

38. *Tripp v Pate*, 49 NC App 329, 271 SE2d 407.

Even where a motion to strike was made at the close of the plaintiff's case, rather than at the close of the entire case, the motion may be untimely. *Levin v Welsh Bros. Motor Service, Inc.* (1st Dist) 164 Ill App 3d 640, 115 Ill Dec 680, 518 NE2d 205, app den 119 Ill 2d 558, 119 Ill Dec 387, 522 NE2d 1246.

presented to the jury,³⁹ and after argument to the jury has commenced.⁴⁰ However, it has been held that a motion to strike may properly be made by a party adversely affected by the introduction of incompetent evidence, at any time prior to the formal closing of the evidentiary record and the final resting of the case by all parties.⁴¹

§ 478. Discretion of court to allow untimely motion

It is within the province of the court to strike out incompetent testimony on request at any time⁴² before the case is submitted to the jury.⁴³

4. GROUNDS FOR MOTION TO STRIKE [§§ 479-482]

§ 479. Generally; specificity of grounds

Striking the testimony of a witness is a drastic remedy, which is not to be lightly done.⁴⁴

A motion to strike must state the specific grounds therefor,⁴⁵ and should be directed specifically to the evidence which the moving party desires to have eliminated.⁴⁶ Where grounds are specified, all other grounds are thereby waived.⁴⁷

§ 480. —Evidence improper in part

A motion to strike evidence competent in part must point with specificity to the particular portion of the evidence deemed to be objectionable.⁴⁸ Where evidence is partly competent, a motion to strike the whole is properly denied.⁴⁹ For instance, a motion to strike the testimony of a witness in rebuttal, on the

39. *United States v Rivera-Santiago* (CA1 Puerto Rico) 872 F2d 1073, cert den 492 US 910, 106 L Ed 2d 576, 109 S Ct 3227 and cert den (US) 107 L Ed 2d 68, 110 S Ct 105; *Wadsworth v Manufacturers' Water Co.*, 256 Pa 106, 100 A 577.

The trial court's refusal to strike an expert witness's testimony was not an error where the record revealed that immediately after the testimony, a discussion of a theoretical connection between diabetes and a hypothalamic injury, the witness stated she was not a medical doctor and did not feel competent to discuss the subject, and where subsequent cross-examination pursued the point at length but the party did not move to strike the testimony until both sides had rested. *Levin v Welsh Bros. Motor Service, Inc.* (1st Dist) 164 Ill App 3d 640, 115 Ill Dec 680, 518 NE2d 205, app den 119 Ill 2d 558, 119 Ill Dec 387, 522 NE2d 1246.

40. *Wicoma Inv. Co. v Pridgeon*, 137 Fla 540, 188 So 597.

41. *State v Pilkey* (Tenn) 776 SW2d 943, reh den (Tenn) 1989 Tenn LEXIS 426 and cert den (US) 108 L Ed 2d 619, 110 S Ct 1483 and cert den (US) 108 L Ed 2d 646, 110 S Ct 1510.

42. *Warren v State*, 103 Ark 165, 146 SW 477.

43. *American Workmen v Ledden*, 196 Ark 902, 120 SW2d 346, 120 ALR 201.

44. *Lawson v Murray* (CA4 Va) 837 F2d 653, 24 Fed Rules Evid Serv 870, cert den 488 US 831, 102 L Ed 2d 63, 109 S Ct 87.

45. *People v Lankford* (1st Dist) 210 Cal App 3d 227, 258 Cal Rptr 322, review den (Cal) 1989 Cal LEXIS 4005; *Lavieri v Ulysses*, 149 Conn 396, 180 A2d 632, 98 ALR2d 1096; *Wideman v Faivre*, 100 Kan 102, 163 P 619; *Stanley v De Cesere* (Me) 540 A2d 767.

As to particular grounds for granting a motion to strike, including improper, unresponsive, contradictory, or incompetent testimony, see § 481.

46. *Southern P.R. Co. v San Francisco Sav. Union*, 146 Cal 290, 79 P 961; *State v Morran*, 131 Mont 17, 306 P2d 679; *Rawle v McIlhenny*, 163 Va 735, 177 SE 214, 98 ALR 930.

47. § 473.

48. *People v Lankford* (1st Dist) 210 Cal App 3d 227, 258 Cal Rptr 322, review den (Cal) 1989 Cal LEXIS 4005.

49. § 482.

ground that part of it is improper rebuttal testimony, is properly denied where the moving party does not point out the improper portion of the testimony.⁵⁰

§ 481. Grounds for granting motion

A motion to strike is the proper remedy for purging the record of improper, unresponsive, or incompetent testimony.⁵¹ Testimony which is uncertain,⁵² contradictory as to allegations or declarations,⁵³ inconclusive, and prejudicial⁵⁴ may be stricken, as may unreasonable testimony,⁵⁵ if it is opposed to common sense or common experience⁵⁶ or contrary to physical facts.⁵⁷

Opinion testimony based entirely upon incompetent and inadmissible matters may be stricken,⁵⁸ as may the testimony of an expert which is cumulative of testimony given by a party to the action.⁵⁹

A motion to strike may also be granted to exclude evidence, apparently legal when given, on the ground that it has since become illegal.⁶⁰

§ 482. Grounds for denying motion

A trial court may properly deny a motion to strike evidence on the ground that—

- It is improper to strike the whole of evidence which is only incompetent in part, where the movant fails to indicate the incompetent or objectionable part.⁶¹
- It is improper to raise the question of the sufficiency of the evidence by a motion to strike out competent⁶² or immaterial evidence.⁶³

50. *Jackson v State*, 173 Miss 776, 163 So 381, 100 ALR 789.

51. § 465.

52. *Fetzer v Aberdeen Clinic*, 48 SD 308, 204 NW 364, 39 ALR 1423.

Where a witness shows lack of knowledge of the facts to which he has testified, the testimony should be excluded. *City Nat. Bank v Nelson*, 218 Ala 90, 117 So 681, 61 ALR 938.

53. *Coons v Pritchard*, 69 Fla 362, 68 So 225; *Holyoke Nat. Bank v Proulx*, 267 Mass 296, 167 NE 521.

54. *State ex rel. Bourg v Marrero*, 132 La 109, 61 So 136; *State v Pruett*, 22 NM 223, 160 P 362.

55. *Wolf v City R. Co.*, 50 Or 64, 85 P 620; *Paul v Philadelphia & R.R. Co.*, 231 Pa 338, 80 A 365.

56. *L'Houx v Union Const. Co.*, 107 Me 101, 77 A 636; *State ex rel. St. Louis Transfer Co. v Clifford*, 228 Mo 194, 128 SW 755.

57. *Sheppard v Wichita Ice & Cold Storage Co.*, 82 Kan 509, 108 P 819; *Louisville Water Co. v Lally*, 168 Ky 348, 182 SW 186.

As to rules of admissibility and the relevancy, materiality, and competency of evidence, see 29 Am Jur 2d, Evidence §§ 249 et seq.

58. *San Diego Land & Town Co. v Neale*, 88

Cal 50, 25 P 977; *Commonwealth, Dept. of Highways v Shaw (Ky)* 390 SW2d 161.

59. *Soderquist v St. Charles Mall Assoc., Ltd.* (2d Dist) 177 Ill App 3d 207, 127 Ill Dec 74, 532 NE2d 903.

As to limitation of cumulative evidence, generally, and evidence of experts, see respectively, §§ 337, 342.

60. *Jacksonville, T. & K.W.R. Co. v Peninsular Land, Transp. & Mfg. Co.*, 27 Fla 1, 9 So 661, reh den 27 Fla 157, 9 So 689; *Davis v Sedalia Yellow Cab Co.* (Mo App) 280 SW2d 869; *Potter Title & Trust Co. v Knox*, 381 Pa 202, 113 A2d 549, 53 ALR2d 709.

61. *Territory by Sharpless v Adelmeyer*, 45 Hawaii 144, 363 P2d 979; *State v Morran*, 131 Mont 17, 306 P2d 679; *State v Marchand*, 31 NJ 223, 156 A2d 245, 87 ALR2d 883; *Yuin v Hilton*, 165 Ohio St 164, 59 Ohio Ops 219, 134 NE2d 719, 57 ALR2d 681.

As to striking evidence competent in part, generally, see § 480.

For discussion of the requisite specificity of a motion to strike evidence in part, see § 479.

62. *Kolka v Jones*, 6 ND 461, 71 NW 558.

63. *Adams v Bolton*, 297 Mass 459, 9 NE2d 562, 111 ALR 856; *State v Sidebottom (Mo)* 753 SW2d 915, cert den 488 US 975, 102 L Ed 2d 550, 109 S Ct 515, post-conviction proceeding (Mo) 781 SW2d 791, cert den (US) 111 L

- It is improper to strike evidence where the parties have stipulated to its admissibility.⁶⁴
- It is improper to strike out testimony on the ground that it is contrary to all of the evidence on the question, it is untrue,⁶⁵ or it states a mere conclusion of a witness.⁶⁶
- It is improper to strike rebuttal evidence which properly is evidence in chief where the court has instructed the jury that the purpose of the evidence is to contradict testimony tending to negate the testimony in chief.⁶⁷
- It is improper to strike a responsive answer because it is not what counsel expected.⁶⁸

E. EXCEPTIONS [§§ 483–489]

Research References

ALR Digest to 3d, 4th, and Federal, Appeal and Error §§ 341-365

Index to Annotations, Appeal and Error; Evidence; Trial

23 Am Jur Pl & Pr Forms (Rev), Trial, Forms 73

9 Federal Procedure, L Ed, Criminal Procedure § 22:816; 33 Federal Procedure L Ed, Trial §§ 77:188, 77:203

6 Am Jur Trials 605, Making and Preserving the Record—Objections § 31

§ 483. Generally; purpose of exception

The ordinary method of raising in the trial court and preserving for review questions which would not otherwise appear upon the record is to bring the matter to the attention of the trial court by means of an objection, and when the ruling is adverse, to take exception to the ruling or other action of the court. The objection lays the foundation for the exception.⁶⁹ The taking of an exception, or its procedural equivalent, the objection,⁷⁰ is essential for this purpose.⁷¹

Ed 2d 804, 110 S Ct 3295, reh den (US) 111 L Ed 2d 822, 111 S Ct 6 (witness unresponsive on cross-examination on collateral matters).

Trial court properly refused to strike the testimony of an eyewitness to a shooting, in a prosecution for murder, although the testimony of the eyewitness was inconsistent on collateral issues, where it was clear and consistent in the crucial matter concerning the actual shooting and killing of the victim. *People v Giles* (2d Dept) 132 App Div 2d 706, 518 NYS2d 186.

64. *Rich v Rogers*, 250 Mass 587, 146 NE 246, 37 ALR 656; *Long v Girdwood*, 150 Pa 413, 24 A 711.

65. *Carlson v Mid-Continent Development Co.*, 103 Kan 464, 173 P 910; *State v Myers*, 7 Nj 465, 81 A2d 710, 25 ALR2d 1171.

Testimony should not be taken from the jury where the witness testifies on cross-examination that he was mistaken, but the reason he gives for his mistake is unsatisfactory. *Van*

Steuben v Central R. Co., 178 Pa 367, 35 A 992.

66. *Anderson v Asphalt Distributing Co. (Mo)* 55 SW2d 688, 86 ALR 1033.

67. *Evans v Commonwealth*, 230 Ky 411, 19 SW2d 1091, 66 ALR 360.

As to evidence in chief given on rebuttal, generally, see §§ 375 et seq.

As to instructions limiting the use and the jury's consideration of evidence, generally, see §§ 1309 et seq.

68. *Brown v Hebb*, 167 Md 535, 175 A 602, 97 ALR 366; *Souza v Becker*, 302 Mass 28, 18 NE2d 350, 120 ALR 1002; *Arp v Wolfe*, 49 Tenn App 294, 354 SW2d 799.

69. 5 Am Jur 2d, Appeal and Error §§ 553-558.

70. § 485.

71. *United States v McCoy*, 193 US 593, 48 L Ed 805, 24 S Ct 528; *American Distilling Co. v*

■■■■ *Practice guide:* The objecting trial attorney is entitled to a ruling on the record regarding the objection. If the court is less than decisive in providing this, counsel should politely request a ruling.⁷²

Where the court makes a definite ruling excluding evidence as immaterial to the issues in the case and that all related evidence is, for that reason, inadmissible, an exception duly taken is all that is required in order to preserve the right of review.⁷³

Another function of an exception, like an objection,⁷⁴ is to provide the court and the opposing party with an opportunity to correct any errors in the conduct of the trial.⁷⁵

§ 484. Right to except to ruling

A party cannot be deprived of an exception seasonably made, unless the court corrects the wrong.⁷⁶ A party does not lose the benefit of exceptions to the exclusion of competent evidence by a demurrer to evidence interposed by his adversary,⁷⁷ by a motion for the direction of a verdict,⁷⁸ or by erroneously captioning a pleading as a motion for a new trial, where it was timely filed and where it specified objections to the rulings of the court on objections to evidence.⁷⁹

§ 485. Requirement of formal exception

In states which pattern their rules of procedure after the federal rules,⁸⁰ a formal exception to an evidentiary ruling is no longer necessary.⁸¹ It is sufficient that a party object to the ruling of the court and state its grounds therefor at the time the ruling is made.⁸²

■■■■ *Recommendation:* Counsel should always consult current state statutes or court rules in the applicable jurisdiction. Although most states follow rules similar to the federal rules, each state's rules may have

Wisconsin Liquor Co. (CA7 Wis) 104 F2d 582, 123 ALR 739; Shadburn Banking Co. v Streetman, 180 Ga 500, 179 SE 377, 99 ALR 854; Princeton Coal Co. v Dorth, 191 Ind 615, 133 NE 386, 24 ALR 1471, reh overr 191 Ind 620, 134 NE 275, 24 ALR 1473; United Collieries, Inc. v Martin, 248 Ky 808, 60 SW2d 125, 89 ALR 971.

Practice References: 6 Am Jur Trials 605, Making and Preserving the Record—Objections § 31.

Forms: Exception to ruling. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 73.

72. § 439.

73. Lilley v Tuttle, 52 Colo 121, 117 P 896.

74. § 395.

75. Williams v New York (2d Dept) 101 App Div 2d 835, 475 NYS2d 495.

76. Todd v Boston E.R. Co., 208 Mass 505, 94 NE 683.

As to the right of a party, generally, to a ruling on an objection to evidence, see § 396.

77. Washburn v Board of Com'rs, 104 Ind 321, 3 NE 757.

As to demurrers to evidence, see §§ 851 et seq.

78. Buckbee v P. Hohenadel, Jr., Co. (CA7 Ill) 224 F 14; Williams v New York (2d Dept) 101 App Div 2d 835, 475 NYS2d 495.

As to the effect of a motion for directed verdict on consideration of evidence, generally, including incompetent evidence admitted without objection, see §§ 981 et seq.

79. Pomerantz v Goldstein, 479 Pa 175, 387 A2d 1280.

80. § 486.

81. Swain v Terry (Ala) 454 So 2d 948; Broberg v Hess (Utah App) 782 P2d 198, 120 Utah Adv Rep 34.

82. Swain v Terry (Ala) 454 So 2d 948; Williams v New York (2d Dept) 101 App Div 2d 835, 475 NYS2d 495.

As to objections, generally, including discussion of the required timeliness and specificity of grounds, see §§ 395 et seq.

Forms: Exception to ruling. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 73.

important differences imposed by statute, rule, or common law.⁸³ The elimination of the necessity for a formal exception does not excuse the necessity to record an objection.⁸⁴

Where a constitutional right is invaded, no exception is necessary.⁸⁵

§ 486. —Federal court practice

Formal exceptions to rulings or orders of the court are unnecessary in actions in federal court, both civil and criminal, and for all purposes for which an exception was once necessary in federal court, an objection now suffices.⁸⁶

§ 487. Sufficiency of exception

In the absence of any statutory provision or rule of court to the contrary, it is not required that an exception be in any particular form.⁸⁷

■■■■ *Reminder:* Counsel should always consult current state statutes or court rules in the applicable jurisdiction.

The exception must be specifically directed to a ruling of the court.⁸⁸ General exceptions are usually insufficient to reserve for review particular grounds of complaint which are not entirely obvious⁸⁹ and the same rule applies where the evidence is competent for any purpose.⁹⁰

A single exception cannot be taken successfully to a number of rulings if any one of the rulings excepted to collectively is correct, the rule being that where an exception covers several propositions, it is a general one, and is unavailing if any one of them is correct,⁹¹ and unless the circumstances are exceptional,⁹² matters not included within specified grounds of exception will not be noticed on review.⁹³

83. Practice References: Danner & Toothman, *Trial Practice Checklists* (1989), § 8:70.

84. *Broberg v Hess* (Utah App) 782 P2d 198, 120 Utah Adv Rep 34.

85. *State v Crofts*, 22 Wash 245, 60 P 403.

86. See Federal Rules of Civil Procedure, Rule 46, as discussed in 33 Federal Procedure, L Ed, Trial §§ 77:188, 77:203; Federal Rules of Criminal Procedure, Rule 51, as discussed in 9 Federal Procedure, L Ed, Criminal Procedure § 22:816.

As to objections to rulings or orders in federal criminal cases, see 9 Federal Procedure, L Ed, Criminal Procedure §§ 22:816-22:818.

For discussion of appeal of evidentiary rulings in federal court actions, see 2 Federal Procedure, L Ed, Appeal, Certiorari, and Review §§ 1 et seq.

Forms: Exception to ruling. 23 Am Jur Pl & Pr Forms (Rev), Trial, Form 73.

Actions in District Court. 1 Federal Procedural Forms, L Ed, §§ 1:1342, 1:1343.

87. *Moody v St. Louis, I.M. & S.R. Co.*, 89 Ark 103, 115 SW 400; *State v Laundry*, 103 Or 443, 204 P 958, reh den 103 Or 503, 206 P 290.

88. *State v Danelly*, 116 SC 113, 107 SE 149,

14 ALR 1420; *Agar Packing & Provision Co. v Weldon*, 42 Tenn App 175, 300 SW2d 51, 67 ALR2d 1023.

As to specific and general objections to evidence, generally, see §§ 424 et seq.

89. *Atlantic C.L.R. Co. v Ford*, 287 US 502, 77 L Ed 457, 53 S Ct 249; *Pennsylvania R. Co. v Minds*, 250 US 368, 63 L Ed 1039, 39 S Ct 531; *United States v United States Fidelity & Guaranty Co.*, 236 US 512, 59 L Ed 696, 35 S Ct 298; *O'Neil v Vermont*, 144 US 323, 36 L Ed 450, 12 S Ct 693; *Union Bleachery v United States* (CA4 SC) 79 F2d 549, 5 USTC ¶ 1502, 35-2 USTC ¶ 9587, 16 AFTR 828, 102 ALR 204; *Re Keenan*, 287 Mass 577, 192 NE 65, 96 ALR 679; *Rodgers v Herron*, 226 SC 317, 85 SE2d 104, 48 ALR2d 1241.

90. *Curtin v Benjamin*, 305 Mass 489, 26 NE2d 354, 129 ALR 433.

91. *Thiede v Utah Territory*, 159 US 510, 40 L Ed 237, 16 S Ct 62; *Jones v East V. & G.R. Co.*, 157 US 682, 39 L Ed 856, 15 S Ct 719.

92. *Kansas City S.R. Co. v Guardian Trust Co.*, 240 US 166, 60 L Ed 579, 36 S Ct 334.

93. *United States v United States Fidelity & Guaranty Co.*, 236 US 512, 59 L Ed 696, 35 S

§ 488. Time of taking exception

The time within which exceptions must be taken may be prescribed by statute.⁹⁴ Compliance with a statutory requirement or rule of court as to the time within which exceptions must be taken is essential to a review by an appellate court.⁹⁵

As a general rule an exception to a ruling should be taken at the time the ruling is made;⁹⁶ exceptions may be made orally at trial, and put in writing after the close of the trial.⁹⁷ Exceptions must in any event be taken during or at the time of the trial,⁹⁸ while the jury is in session,⁹⁹ and certainly before the rendition of the verdict.¹

§ 489. Waiver of exception

Failure to save a required exception waives an error occurring at the trial.²

■■■■ Observation: For the attorney who fails to make a timely objection, or for that matter, exception, the only hope for review may be the “plain error rule” allowing courts to take notice of plain errors affecting substantial rights, even though they were not brought to the attention of the trial court.³

An exception to the admission of evidence may be waived by the subsequent admission of similar evidence without objection,⁴ and exceptions based upon the admission or rejection of evidence may be waived by a demurrer to the evidence.⁵ An exception to the erroneous admission of evidence is not waived

Ct 298; *Harnden v Milwaukee Mechanics' Ins. Co.*, 164 Mass 382, 41 NE 658.

94. *Kleinschmidt v McAndrews*, 117 US 282, 29 L Ed 905, 6 S Ct 761.

95. *Kahn v Carl Schoen Silk Corp.*, 147 Md 516, 128 A 359, 44 ALR 285; *Ferris v American Ins. Union*, 245 Mich 548, 222 NW 744, 65 ALR 1033; *Pomerantz v Goldstein*, 479 Pa 175, 387 A2d 1280; *Just v Littlefield*, 87 Wash 299, 151 P 780.

■■■■ Reminder: Counsel should always consult current state statutes or court rules in the applicable jurisdiction.

96. *Stewart v Wyoming Cattle Ranch Co.*, 128 US 383, 32 L Ed 439, 9 S Ct 101; *United States v Carey*, 110 US 51, 28 L Ed 67, 3 S Ct 424; *Bank of New Orleans v Caldwell*, 154 US Appx 592, 21 L Ed 305, 14 S Ct 1171; *H.S. Kerbaugh, Inc. v Caldwell* (CA3 Pa) 151 F 194; *Swain v Terry* (Ala) 454 So 2d 948; *Beene v County Board of Education*, 217 Ark 553, 231 SW2d 594; *Solomon v Dabrowski*, 295 Mass 358, 3 NE2d 744, 106 ALR 464; *Williams v New York* (2d Dept) 101 App Div 2d 835, 475 NYS2d 495 (by implication); *Pomerantz v Goldstein*, 479 Pa 175, 387 A2d 1280.

As to the timeliness of objections to the admission or exclusion of evidence, generally, see §§ 401 et seq.

97. *Hunnicut v Peyton*, 102 US 333, 26 L Ed

113; *United States v Breitling*, 61 US 252, 15 L Ed 900; *Poole v Lessee of Fleege*, 36 US 185, 9 L Ed 680.

98. *Fleischmann Constr. Co. v United States*, 270 US 349, 70 L Ed 624, 46 S Ct 284; *Swain v Terry* (Ala) 454 So 2d 948; *Williams v New York* (2d Dept) 101 App Div 2d 835, 475 NYS2d 495; *Pomerantz v Goldstein*, 479 Pa 175, 387 A2d 1280.

99. *Pacific Express Co. v Malin*, 132 US 531, 33 L Ed 450, 10 S Ct 166; *Canal & C.S.R. Co. v Hart*, 114 US 654, 29 L Ed 226, 5 S Ct 1127; *Barton v Forsyth*, 61 US 532, 15 L Ed 1012.

1. *Hunnicut v Peyton*, 102 US 333, 26 L Ed 113.

2. *Princeton Coal Co. v Dorth*, 191 Ind 615, 133 NE 386, 24 ALR 1471, reh overr 191 Ind 620, 134 NE 275, 24 ALR 1473.

For a discussion of waiver of objection, and grounds for appeal thereon, see §§ 412 et seq.

3. § 406.

4. *Wood v Kerr Dry Goods Co.*, 190 Okla 197, 121 P2d 992.

As to waiver of ground for objection by offering evidence of the same or similar nature, see § 420.

5. *Pomeroy's Lessee v State Bank of Indiana*, 68 US 592, 17 L Ed 638.

by a failure to object to an attempted withdrawal thereof as insufficient.⁶

A defendant's failure to take an exception is immaterial where exception is taken by the codefendant's counsel, who is conducting the defense in general for both defendants.⁷

Moving for a new trial is not a waiver of an exception taken at trial to a ruling of the court as to the admissibility of evidence.⁸

As to demurrer to evidence, generally, see §§ 851 et seq.

6. Watson v Adams, 187 Ala 490, 65 So 528.

As to waiver of error by withdrawal of evidence, generally, see § 423.

7. McCarthy v General Electric Co., 151 Or 519, 49 P2d 993, 100 ALR 1370.

8. United States v Dashiell, 71 US 182, 18 L Ed 319.

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